

No. 82-1832-CFX
Status: GRANTED

Title: Town of Hallie, et al., Petitioners
v.
City of Eau Claire

Docketed:
May 11, 1983

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Covelli, Claude J.

Counsel for respondent: Fischer, Frederick W.

Entry	Date	Note	Proceedings and Orders
1	May 11 1983	G	Petition for writ of certiorari filed.
2	Jun 10 1983		Brief of respondent in opposition filed.
3	Jun 15 1983		DISTRIBUTED. September 26, 1983
4	May 13 1984		REDISTRIBUTED. May 24, 1984
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10	Jul 26 1984		Brief amicus curiae of American Ambulance Assn., et al. filed.
11	Jul 27 1984		Brief amicus curiae of Town of St. Cloud, MN filed.
12	Jul 30 1984		Brief amicus curiae of Pacific Legal Foundation filed.
13	Jul 26 1984		Brief of petitioner Town of Hallie, et al. filed.
14	Jul 26 1984		Joint appendix filed.
15	Aug 2 1984		Records filed.
17	Aug 21 1984		Order extending time to file brief of respondent on the merits until September 14, 1984.
18	Aug 27 1984		Record filed.
19	Sep 14 1984		Brief amicus curiae of Nat'l. Inst. of Municipal Law Officers filed.
20	Sep 14 1984		Brief amicus curiae of Virginia, et al. filed.
21	Sep 14 1984		Brief amicus curiae of United States filed.
22	Sep 14 1984		Brief amicus curiae of Illinois, et al. filed.
23	Sep 14 1984		Brief amicus curiae of U.S. Conference of Mayors, et al. filed.
24	Sep 14 1984		Brief of respondent City of Eau Claire filed.
25	Sep 14 1984		Brief amicus curiae of American Public Power Assn., et al. filed.
26	Oct 10 1984		CIRCULATED.
27	Oct 22 1984		SET FOR ARGUMENT. Monday, November 26, 1984. (3rd case).
28	Nov 6 1984	D	Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument filed.
29	Nov 13 1984		Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for additional time for oral argument DENIED.
30	Nov 15 1984	X	Reply brief of petitioners Town of Hallie, et al. filed.
31	Nov 26 1984		ARGUED.

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No.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

**TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION
and TOWN OF WASHINGTON,**

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

56p1

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QUESTIONS PRESENTED

The Court of Appeals ruled that the City's anticompetitive conduct was exempt from the Sherman Act relying on its formulation of the *Parker v. Brown* test. The questions presented on this petition are:

1. If a state statute permits a city to engage in conduct which, under some circumstances, may be anticompetitive in violation of the Sherman Act, is it proper for the court to assume the state contemplated such anticompetitive conduct and infer that the state condones it?
2. If it is proper under circumstances identified in question one for the court to infer that the state condones certain anticompetitive conduct, is this inference sufficient to meet the "clearly articulated and affirmatively expressed" state policy test defined by this Court?
3. Does the fact that a person engaging in anticompetitive conduct is a municipality eliminate the requirement that the anticompetitive conduct be "actively supervised by the state"?

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The petitioners, Town of Hallie, Town of Seymour, Town of Union and Town of Washington ("Towns") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered February 17, 1983.*

* The named parties are the only parties to this litigation.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals, not yet reported, appears in Appendix A to this Petition. The decision rendered by the United States District Court for the Western District of Wisconsin on respondent's motion for summary judgment appears in Appendix B. The Judgment appears in Appendix C.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit was entered on February 17, 1983. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case concerns the intended scope of the Sherman Act, specifically Section 1, 15 U.S.C. §2 (1980), and Wisconsin Statutes §66.069(2)(c) (1979) and §144.07(lm) (1979). These statutes are set forth in Appendix D.

STATEMENT OF THE CASE

This petition arises from the district court's dismissal of the complaint filed by the petitioners, the Towns of Hallie, Seymour, Union and Washington, in *Town of Hallie, Town of Seymour, Town of Union and Town of Washington v. City of Eau Claire*, Civil Action No. 80-CV-527 (W.D. Wis.), an action filed by the Towns on October 6, 1980. The Towns' complaint alleges that the City was monopolizing interstate commerce in the sale of sewage collection and transportation services in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

The Towns' complaint alleges that the City constructed a regional sewage treatment facility with federal funds. Although this facility is located within the City and is owned and operated by the City, it was designed and intended to serve the geographic region consisting of the City and the Towns. This facility is the only sewage treatment facility in the market available to the Towns and, as a result, the City enjoys a monopoly in the market for sewage treatment services in the geographic market in which the Towns are located.

The Towns are actual or potential competitors with the City in the market for sewage collection and transportation services in the geographic market in which the Towns are located and in which the City holds a monopoly over sewage treatment services. However, the Towns can sell sewage collection or transportation services only if they can purchase treatment services from someone else.

The City's anticompetitive conduct in violation of the Sherman Act is the monopolization of collection and transportation services in the Towns. The City offers to sell such services, as well as treatment services, to persons located in the Towns but refuses to sell treatment services to the Towns. By refusing to sell treatment services to the Towns, the City has prevented the Towns from competing with the City in the markets for collection and transportation services. Since the Towns have no means of disposing of the sewage other than the City's facility and since the City will not sell them treatment service, the Towns cannot collect sewage and have no place to which to transport it. The result is the City has monopolized collection and transportation services by its use of its monopoly power in treatment services.

On April 5, 1982, the District Court dismissed the Towns' complaint. Relying upon *Parker v. Brown*, 317 U.S. 341 (1943), *Community Communications Company v. Boulder*, 455 U.S. 40 (1982) and *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the District Court ruled that the City's conduct was exempt under the *Parker v. Brown* test. This resulted in a final judgment of the same date which was appealed to the Seventh Circuit.

The Seventh Circuit acknowledged that the *Parker v. Brown* test requires that the City's anticompetitive conduct be authorized by the state pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. The Seventh Circuit held Wis. Stats. Sections 66.069(2)(c) and 144.97(lm) satisfied this requirement, although neither addresses nor expresses a policy that the City provide these services on a monopoly basis.

In reaching this result, the Seventh Circuit held that the state need not express a policy authorizing the City to displace competition in sewage service with monopoly service. Instead, all that is required is that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services" because the Court then "can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization" and having made that assumption the Court "can infer that it [the state] condones the anticompetitive effect." The Seventh Circuit held this sufficient to meet the "clear articulation and affirmative expression" test of *Parker v. Brown*. Appendix A, pp. 8-10.

The Seventh Circuit acknowledged that *California Retail Liquor Dealers Association v. Midcal Aluminum* requires "active state supervision" for exemption under the *Parker v. Brown* test. The Seventh Circuit held that this holding in *Midcal* only applies to private parties. The Seventh Circuit held municipalities are immune under *Parker v. Brown* if they meet the clear articulation and affirmative expression standard even though there is no active state supervision.

REASONS FOR GRANTING THE WRIT

I.

THE TEST ANNOUNCED BY THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT BECAUSE: (1) IT HOLDS STATE NEUTRALITY IS SUFFICIENT TO MEET THE "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY" TEST; AND (2) IT HOLDS ACTIVE STATE SUPERVISION IS NOT NECESSARY FOR IMMUNITY FROM THE SHERMAN ACT.

The Seventh Circuit has devised a new test for municipal immunity from the antitrust laws in direct conflict with the letter and spirit of the test announced by this Court. Contrary to this Court's pronouncements, the Seventh Circuit gives municipalities a special status conferring immunity not available to other "persons" subject to the Sherman Act. The Seventh Circuit's test for municipalities has eliminated the "clearly articulated and affirmatively expressed" standard defined by this Court. In its place, the Seventh Circuit accepts state "neutrality", something this Court has expressly rejected. The Seventh Circuit has also eliminated the "active state supervision" requirement. The result of the Seventh Circuit's test is that municipalities are left to make economic choices contrary to the antitrust laws guided solely by their own parochial interests. The Seventh Circuit's test is the antithesis of the policy underlying this Court's decisions creating the limited exemption to the Sherman Act.

A. The decisions of this Court require that before anti-competitive conduct is exempt from the Sherman Act, the conduct: (1) must be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and that state neutrality is not sufficient; and (2) must be actively supervised by the state.

The Sherman Act prohibits "any person" from monopolizing any part of commerce. 15 U.S.C. Section 2. Recently in *Jefferson County Pharmaceutical Ass'n., Inc. v. Abbott Laboratories*, 103 S.Ct. 1011, 1016 (1983), a case applying the Robinson-Patman Act to state purchases, this Court reiterated that the antitrust laws represent

a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states

and the "heavy presumption against implicit exemptions" from the antitrust laws. As to municipal exemption, the Court stated:

In *City of Lafayette, supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." [435 U.S. 403. See also *id.* at 408. *Abbott Laboratories, id.* at 1016-17.]

Therefore, cities as well as all other subdivisions of the states are subject to the restraints of the Sherman Act and are no more exempt from the Act than are private

corporations.¹ *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-408 (1978) and *Community Communications Co. v. Boulder*, 455 U.S. 40, 50-51 (1982).

On the other hand, the individual states, while acting as sovereign, are not subject to the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).² The fact the Sherman Act does not apply to the states does not enable the states to grant immunity to any other "person" covered by the Act by authorizing them to violate the Act or by declaring their action is lawful.³ Therefore, it is only anticompetitive conduct attributable to the states which is exempt from the Sherman Act.

This does not mean a state may not implement its own anticompetitive activities through authorized agents acting on its behalf. Under the *Parker v. Brown* test, "person[s]" otherwise subject to the Act are exempted from

¹ The same may not be true with respect to remedies available against cities under the Sherman Act or with the determination of whether a particular activity is anticompetitive. *Lafayette*, *supra* at 401-02 and 417 n. 48.

² This results from applying the principle of federalism to the fact that nothing in the language or history of the Sherman Act suggests a Congressional intent to restrain a state or its officers and agents from activities directed by its legislature. *Parker*, *id.* Cities are not sovereign under our dual system of government; therefore, the *Parker v. Brown* test does not afford any exemption to cities based upon their status as subdivisions of a state. *Boulder*, *supra* at 50-51.

³ "... [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. ..." *Parker*, *supra* at 351; *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

its restraints while and to the extent such "person[s]" are acting on behalf of the state at the state's direction or authorization to carry out the state's policy to displace competition with regulation or monopoly service. *Lafayette*, *supra* at 408-17; *Boulder*, *supra* at 52-56. This limited exemption for entities other than states is "... simply a recognition that a state may frequently choose to effect its policies through the instrumentality of its cities and towns." *Boulder*, *supra* at 51.

The purpose of the exemption is to avoid restraining the state's sovereign rights by a restraint of the state's agents. *Parker*, *supra* at 350-51. Therefore, while a city may perform anticompetitive acts while acting on behalf of the state at the state's direction pursuant to the state's policy,

... when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. [*Lafayette*, *supra* at 416; *Boulder*, *supra* at 57.]

The Court has devised a single test applicable to both private and public entities claiming to act on behalf of the state. This test furthers the policy of federalism without impairing the goals Congress sought by enacting the Sherman Act. See *Lafayette*, *supra* at 415. This test applies equally to private and public entities because the policy of federalism, i.e., state sovereignty, is not furthered unless the activity in question is attributable to the state acting as sovereign. This is determined by the state's involvement in the activity and not the nature of the person claiming to act on behalf of the state. Likewise, if municipalities were free to make economic choices based solely upon their own parochial interest, "a serious chink in the armor of the antitrust protection would be introduced at

odds with the comprehensive national policy Congress established." *Lafayette, supra* at 408. This is so because the economic choices made by public corporations are not more likely to comport with these national policies than those made by private corporations. *Lafayette, supra* at 403.

The test devised by this court requires that the state direct or authorize a city or other "person" to act on behalf of the state to carry out the state's policy to displace competition with regulation or monopoly service. *Lafayette, supra* at 413. The policy to displace competition must be "clearly articulated and affirmatively expressed" by the state. *Boulder, supra* at 54. Further, the policy must be "actively supervised" by the state itself. *Lafayette, supra* at 410; *Midcal, supra* at 105.

Under this Court's test, a state's neutrality on the matter or the fact that a city's anticompetitive conduct is lawful under state law is not sufficient. *Lafayette, supra* at 414-15 and 415 n. 45; *Boulder, supra* at 55/56.

A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted" since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. [*Boulder, supra* at 55.]

Neutrality cannot be the basis for immunity because:

... [I]n the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command" or to be restraints that "the state . . . as sovereign" imposed. [*Lafayette, supra* at 414.]

Therefore, the state must affirmatively address the anti-competitive action and expressly direct or authorize the city to engage in such conduct.

B. The Seventh Circuit's test accepts state neutrality as sufficient for exemption and is in direct conflict with this Court's decisions which expressly reject state neutrality as sufficient.

In this case, the alleged violation of the Sherman Act is monopolization. The City is using monopoly power in one product market to monopolize other product markets. The Towns do not contend that the State of Wisconsin has prohibited the City's monopolization. Rather, the Towns contend that the City is subject to the antitrust laws because the state has neither affirmatively addressed this subject of monopolization nor clearly expressed a state policy that the competition between the City and other providers of services be displaced by monopoly service by the City.

The Seventh Circuit did not find that the state affirmatively addressed this subject and clearly expressed a state policy to displace this competition. Instead, the Seventh Circuit devised a new test for determining exemption, which accepts state neutrality as sufficient. This test is in direct conflict with this Court's express holdings in *Lafayette* and *Boulder*.

The focus of the test announced by this Court is whether there is a state policy to displace competition with regulation or monopoly service. *Lafayette, supra* at 413. In the context of this case, the focus is on the existence of a state policy to displace competition in the provision of collection and transportation services in the unincorporated areas surrounding a city with monopoly service. The Seventh Circuit specifically rejected the search for a state

policy to displace competition as relevant. Instead, the Seventh Circuit focused upon the City's right under state law to determine on its own to whom the City would sell treatment services, without regard to whether the state ever affirmatively addressed or expressed a state policy that the competition in collection or transportation services be displaced.⁴ This is in direct conflict with this Court's test which makes the existence of a state policy to displace competition determinative.

Since the Seventh Circuit did not focus upon the proper state policy, it did not and could not utilize the "clearly articulated and affirmatively expressed" test required by this Court. Instead, the Seventh Circuit devised a new test. The new Seventh Circuit test is described as follows:

In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization. . . . If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity. [Seventh Circuit Opinion, Appendix A, pp. 8-9.]

The Seventh Circuit's test is that when a state permits a city to sell sewage services and to determine to whom it will sell such services, which authority under some circumstances is capable of being used by the City in an

⁴ After rejecting the towns' formulation of the issue, the Seventh Circuit said, "The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing effect that results from refusing to provide these services." Seventh Circuit Opinion, Appendix A, p. 9.

anticompetitory fashion in violation of the Sherman Act, then the court can *assume* that the state contemplated this anticompetitive activity and can *infer* that the state *condones* it. The Seventh Circuit test: (1) does not require that the state affirmatively address the issue of competition or monopoly service; (2) does not require that the state express a policy to displace competition with monopoly service; and (3) does not require that the state direct or authorize the City to carry out this policy. The Seventh Circuit's test is the embodiment of the concept of "neutrality" expressly rejected by this Court.

In *Boulder, supra* at 57, this Court reaffirmed what it had said in *Lafayette*.

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the anti-trust laws. . . . [A]ssuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs. (Emphasis added.)

In this case, the state has not authorized the City to provide any of the services in question in the unincorporated areas constituting the Towns on a monopoly basis. The state has not even addressed the issue of competition. At best, the state's position, *i.e.*, condoning conduct, is one of neutrality. This Court has expressly held that state neutrality is not sufficient for immunity.

The Seventh Circuit's application of its test to the Wisconsin Statutes proves that its test is in direct conflict with this Court's decisions. The Seventh Circuit relies

solely upon Sections 66.069(2)(c) and 144.07(lm), Wisconsin Statutes, as the clear expression and affirmative articulation of Wisconsin state policy. Neither of these statutes enunciates a state policy in conflict with the policy of the Sherman Act because neither state statute directs or authorizes the City to provide service in the Towns on a monopoly basis. In fact, it is questionable whether either statute deals with the subjects of competition or monopoly service at all.

The Seventh Circuit stated:

Section 66.069(2)(c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area. [Appendix A, p. 12.]⁵

This statute is totally neutral as to whether the City should provide service outside the City limits or under what circumstances it should do so. This statute does not even suggest that the City monopolize services in the Towns. It does not deal with the subject of competition or monopoly service at all. The decision to whom the City will sell services under this statute is left totally in the hands of the City.

The Seventh Circuit stated:

. . . [S]ection 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewage system to a town, but if that town then refused to become annexed to the

⁵ This statute does not even apply. All the Towns seek is the right to buy treatment service from the City. The Towns acknowledge they will have to deliver the sewage to the City's pipes at the City corporate limits. Therefore, the relief the Towns seek does not require the City to extend sewage service to anyone outside the City limits.

city, the order becomes void and the city has no obligation to extend the sewerage system. [Appendix A, pp. 12-13.]

Section 144.07(lm) does not authorize the City to provide service in the Towns on a monopoly basis. The statute neither deals with monopoly service nor grants cities any power or authority. The statute deals with the revocation of Department of Natural Resources orders. The statute does not apply to the case because: (1) there is no such order; and (2) no one is asking the City to extend a sewage system into the Towns. Therefore, even if Section 144.07(lm) granted the City some authority, which it does not do, it does not authorize the City to provide service in the Towns on a monopoly basis.

These statutes do not in any way evidence a state policy that cities provide sewage services in the towns on a monopoly basis, let alone a policy that cities use predatory conduct to eliminate the towns as competitors. At most, these statutes give cities the authority to engage in conduct which may or may not have anticompetitive effects. The cities are therefore free under state law to engage in monopolization of these services in the towns without regard to state policy since the state has not announced any policy. The result of the Seventh Circuit's decision is to permit these cities to engage in anticompetitive conduct guided solely by the dictates of each city's own parochial interests. This is in direct conflict with the policy underlying this Court's decisions in *Lafayette* and *Boulder*.

If the Seventh Circuit's test is applied to the facts in *Boulder*, the result is that the City of Boulder is immune from the Sherman Act. Clearly, Boulder had authority to regulate cable television services provided within the city's corporate limits and to adopt ordinances for that purpose. It is also clear that Boulder could use that au-

thority in an anticompetitive manner, since that is exactly what was alleged in the case. Under the Seventh Circuit's test, the court assumes Colorado contemplated this anticompetitive use of the authority given and condones it. Therefore, under the Seventh Circuit's test, Boulder is immune from the Sherman Act.

This was not the result in *Boulder* because in *Boulder*, as in this case, the state had not created a policy that service (cable television or sewage service) be provided on a monopoly basis. In *Boulder*, as in this case, the anticompetitive nature of the city's conduct was attributable to the city and not the state. The test used by the Seventh Circuit contradicts the test established in *Boulder* and *Lafayette*.

C. The Seventh Circuit's test is in direct conflict with the decisions of this Court because it eliminates the active state supervision requisite established by this Court's decisions.

In *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. at 105, this Court, after reviewing its previous decisions defining the *Parker v. Brown* test, stated:

These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978) (opinion of Brennan, J.).

This Court has established a single test for determining immunity under *Parker v. Brown*, regardless of whether the entity claiming immunity was a municipality or other "person" subject to the Sherman Act. While *Midcal* was not a municipality case, the authority cited for this test

in *Midcal*, i.e., *Lafayette*, was. In *Lafayette* and in *Boulder* the Court cited non-municipal cases and used the test formulated in those cases without change. While the Court in *Boulder* did not have to, and therefore did not, reach the "active state supervision" prong of the *Parker v. Brown* test, there is no authority in any of this Court's decisions for elimination of this prong of the test.

Since, "... a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful", active state supervision is required to assure that the anticompetitive conduct is attributable to the state and not the "person" allegedly acting on behalf of the state. *Midcal*, *supra* at 105-06. This assurance is just as necessary, if not more so, when a municipality is involved rather than a state commission or board.

The Seventh Circuit's reason for eliminating this prong of the test is without merit. The Seventh Circuit reasons that in the case of a municipality:

Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. [Appendix A, p. 16.]

But all "persons" seeking immunity under *Parker v. Brown* must establish they are acting pursuant to a clearly articulated and affirmatively expressed "state policy to displace competition". Therefore, the existence of such policy does not distinguish municipalities from any other "person" claiming immunity under *Parker v. Brown*. Nor are municipalities any less likely to make economic decisions based upon their own parochial interests than any other "person" seeking immunity. The teaching of

Lafayette is that municipalities are just as likely to be guided by their parochial interests as private corporations. *Lafayette, supra* at 403.

In this case, what restraints are imposed on the City by Sections 66.069(2)(c) and 144.07(lm), Wisconsin Statutes? None. The state has left the City free to do as it pleases. The anticompetitive conduct here is the City's, not the state's. State supervision is necessary to guarantee the anticompetitive conduct is the state's and not merely a "person" claiming to act on behalf of the state. If the restraints of the Sherman Act are removed in this case, the City has carte blanche to use its monopoly power as its parochial interests dictate, unfettered by state or federal policy or law.

II.

THE SEVENTH CIRCUIT'S TEST OF CLEAR ARTICULATION AND AFFIRMATIVE EXPRESSION IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN RONWIN.

In *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982), the Ninth Circuit applied the *Parker v. Brown* test to a public entity. The state agency involved in *Ronwin* was a "committee" established and appointed by the Arizona Supreme Court.⁶ Therefore, the "committee" claiming immunity was a public body or subdivision of the state.⁷ The Ninth Circuit stated:

⁶ As in *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977), the Arizona Supreme Court is the ultimate body wielding the state's power over the practice of law and, therefore, its action in regulating the practice of law is a restraint of the state acting as sovereign.

⁷ The "committee" was not a committee of the State Bar.

... Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker, Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state department. (Cites omitted.) [*Ronwin, supra* at 697.]

The Ninth Circuit stated the committee's failure to meet either the "clearly articulated and affirmatively expressed" standard or the "actively supervised" standard of the *Parker v. Brown* test would result in denial of immunity. *Ronwin, supra* at 696. The "committee" failed to meet the former; therefore, the latter was not reached.

The challenged activity was that the committee graded the exam to admit a predetermined number of persons without reference to achievement. The committee was delegated the general authority to examine applicants and to grade the tests, but no rule of the Arizona Supreme Court directed or authorized the committee to do so in an anticompetitive fashion. The Court stated:

... we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy," *Midcal's* first requirement. *Id.* Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure. [*Ronwin, id.*]

If the Seventh Circuit's test is applied to the facts in *Ronwin*, the committee is immune from the Sherman Act. The committee was authorized to determine who was quali-

fied for the bar and who passed the bar exam. It is foreseeable that the committee might use this power in an anti-competitive manner, i.e., only passing a predetermined number of applicants. Therefore, it is assumed the Arizona Supreme Court "condoned" this activity and the committee is immune from the Sherman Act."

The *Ronwin* test for determining immunity for a public entity is in direct conflict with the Seventh Circuit's test. Unlike the Seventh Circuit, the Ninth Circuit applies the same test for all "persons" claiming immunity from the antitrust laws and does not substitute state neutrality for a "clearly articulated and affirmatively expressed" state policy to displace competition.

III.

THE SEVENTH CIRCUIT'S DECISION WILL CREATE THE VERY SERIOUS CHINK IN THE ANTITRUST LAWS WHICH THE BOULDER DECISION AVOIDED.

The concept of state neutrality embodied in the Seventh Circuit's decision is the same as the local autonomy addressed in *Boulder*. It is not the state displacing competition; it is the municipalities, having been left free to do as they please by the state, displacing competition with monopolization. In 1978, there were 2,844 units of local government in Wisconsin: 72 counties, 187 cities, 392 villages, 1,269 towns, 427 school districts and 497 other special districts. State of Wisconsin, *Blue Book*, 1979-80, p. 109. This multiplicity of local units of government in Wisconsin represents but one of the 50 states. The Seventh Circuit's decision would give each of these units a special

* "State supervision" is no bar to immunity under the Seventh Circuit test because it is not required by the Seventh Circuit.

status and would let these thousands upon thousands of local units of government free to make economic choices at odds with the comprehensive national policy established by Congress in the antitrust laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 82-1715

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION
and TOWN OF WASHINGTON, Wisconsin townships,
Plaintiffs-Appellants,
v.

CITY OF EAU CLAIRE, a Wisconsin municipal corporation,
Defendant-Appellee.

On appeal from the United States District Court for the
Western District of Wisconsin.
No. 80 C 527—*John C. Shabaz*, Judge.

ARGUED OCTOBER 29, 1982—DECIDED FEBRUARY 17, 1983

Before ESCHBACH, *Circuit Judge*, COFFEY, *Circuit Judge*,
and WISDOM, *Senior Circuit Judge*.*

WISDOM, *Senior Circuit Judge*. Four towns allege that
a city is using a monopoly over sewage treatment services
in the relevant geographic market to gain a monopoly in
the markets for sewage collection and sewage transportation
in violation of the Sherman Act, 15 U.S.C. §1 (1973),

* Honorable John Minor Wisdom, Senior Circuit Judge for the
United States Court of Appeals for the Fifth Circuit sitting by
designation.

the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1978), and a state common law duty of a utility to serve. On appeal, the towns contend that the district court erred in dismissing their claims under the Sherman Act on the ground that the conduct in question falls within the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943). We conclude that the conduct in question is exempt from the antitrust laws under *Parker* and *Community Communications Company v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), and we affirm the district court's decision.

I.

The plaintiffs-appellants—Town of Hallie, Town of Seymour, Town of Union, and Town of Washington (“Towns”)—are four Wisconsin townships that are adjacent to the City of Eau Claire (“City”). The City used federal funds to build a sewage treatment facility within the city limits, and this sewage treatment facility is the only such facility in the market available to the Towns. As a result, the City enjoys a monopoly in the market for sewage treatment services.¹

The City has refused to supply sewage treatment services to the Towns. The district court found that the City has provided sewage treatment services to individual landowners in the Towns only if they will agree to become annexed by the City and thereby obtain sewage collection and transportation services from the City. *Town of Hallie v. City of Eau Claire*, No. 80-C-527, slip op. at 1 (W. D. Wisc. April 5, 1982). By refusing to provide treatment services to the Towns, the City has prevented the Towns

¹ The disposal of sewage is a three-step process. Sewage must be collected from the user, transported to the treatment facility, and treated and disposed of by the treatment facility. The City's monopoly in this case extends only to the third step.

from competing in the markets for sewage collection and transportation. The Towns simply have no means of disposing of the sewage once they collect and transport it, so they do not collect it at all.

In their complaint seeking injunctive relief, the Towns alleged that the City's denial of sewage treatment services to them violated the Sherman Act, the Federal Water Pollution Control Act, and a common law duty of a utility to serve. The City moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b), and the district court granted the motion. The district court dismissed the antitrust claims on the grounds that the City's conduct was exempt from the Sherman Act under *Parker v. Brown*.² The district court dismissed the Federal Water Pollution Control Act claim, holding that the Act does not provide a right to sue, that the Towns failed to pursue administrative remedies, and that the Act does not mandate the action that the Towns seek. After dismissing the federal claims, the district court dismissed the pendent state claim.

On appeal, the Towns contest only the denial of their antitrust claims. The Towns contend that the City's conduct is exempt from the Sherman Act only if it is in furtherance of clearly articulated and affirmatively expressed state policy and it is actively supervised by the State of Wisconsin. The Towns contend that state action immunity is unavailable to the City because it has met

² The Towns brought their antitrust claims under a number of theories. The first claim was that the City used its monopoly over sewage treatment to gain a monopoly over sewage collection and transportation. The second claim was that requiring the consumer to obtain sewage and collection services in order to gain sewage treatment services constituted an illegal tying arrangement. The third claim was that the City's conduct was an illegal refusal to deal with the Towns.

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neither of these two requirements. The City contends that its denial of services to the Towns is authorized by clearly articulated state policy and that state action immunity protects its conduct.

II.

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court addressed the issue whether the federal antitrust laws prohibited the State of California from adopting a program that prevented raisin producers from freely marketing their crop in interstate commerce. The Court held that the marketing program was exempt from the antitrust laws by virtue of limitations in the Sherman Act and concepts of federalism:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-51, 63 S.Ct. at 313, 87 L.Ed. at 326.

The Supreme Court later addressed the question whether the "state action" immunity exemption of *Parker v. Brown* was available to a state's municipalities.³ In *City*

³ During the period from 1943 to 1975, the Supreme Court did not address the state action immunity question. Since 1975, the Court has addressed the issue of immunity under *Parker* in seven cases. The Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the anti-

(footnote continued)

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of *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 53 L.Ed.2d 364 (1978),⁴ a private utility company brought suit under the Sherman Act against several Louisiana cities empowered to own and operate electric utility systems and alleged that they had committed various antitrust offenses in their operation of their utility systems. A majority of the Court rejected the contention that Congress did not intend the Sherman Act to apply to local governments, and a plurality of the Court stated:

Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. Parker's limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-413, 98 S.Ct. at 1136, 55 L.Ed.2d at 382-83. The Court recognized, however, that the state as

(footnote continued)

trust laws, such as restrictive licensing practices, state action serving as a mask for private cartels, and instances of nominal state regulation in which the state took no active role. M. Handler, *Reforming the Antitrust Laws* 59 (1982). There was also the concern that regulated industries control their regulators and that private corporations use the political process to obtain monopoly profits. See R. Posner, *Economic Analysis of Law* 405-07 (2d ed. 1977).

⁴ For a discussion of the Court's decision in *City of Lafayette*, see Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435 (1981) [hereinafter "Antitrust Immunity"].

sovereign might sanction anticompetitive activity by the municipalities and immunize this activity from antitrust liability.⁵ The Court concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383.⁶

The Supreme Court returned to the issue of state action immunity for municipalities in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102

⁵ The Court recognized that municipal corporations are instrumentalities of the state for the convenient administration of government and that a state may choose to effect its policies through the instrumentality of its cities and towns. *City of Lafayette*, 435 U.S. at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810, 819 (1981).

⁶ The Court in *City of Lafayette* reviewed a series of opinions dealing with the *Parker* exemption. The Court discussed *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which held that the antitrust laws did not apply to a ban on attorney advertising directly imposed by the Arizona Supreme Court. The Court emphasized that the state policy at issue in *Bates* was part of a comprehensive regulatory system, was clearly articulated and affirmatively expressed as state policy, and was actively supervised by the Arizona Supreme Court. *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135, 55 L.Ed.2d at 381. The Supreme Court in later cases has focused on the language requiring a "clearly articulated and affirmatively expressed state policy" and "active state supervision" in formulating the test to determine if conduct by governmental entities falls within the *Parker* exemption. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

S.Ct. 835, 70 L.Ed.2d 810 (1982).⁷ The Court addressed the question whether the *Parker* immunity extended to a "home rule" municipality that was granted extensive powers in local and municipal matters by the state constitution. The Court concluded that the restraint in question, a moratorium on the expansion of cable television enacted by the City Council of Boulder,⁸ could not be exempt from antitrust scrutiny unless it constituted the action of the State of Colorado itself in its sovereign capacity or municipal action in furtherance of clearly articulated and affirmatively expressed state policy. The Court held that the guarantee of local autonomy to municipalities through the Home Rule Amendment to the Colorado Constitution did not constitute the "clear articulation and affirmative expression" of state policy

⁷ Between the decisions of *Lafayette* and *Boulder*, the Supreme Court addressed the issue of state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). The State of California by statute required that wine suppliers set dealer resale prices and that dealers sell at those prices. The Court held that two standards must be met if this anticompetitive conduct were to receive antitrust immunity under *Parker v. Brown*. The challenged conduct must be one clearly articulated and affirmatively expressed as a state policy, and it must be actively supervised by the state. The Court struck down the statutory resale price maintenance scheme because there was no active state supervision over the private parties that were given the power to set prices under the statute. *Id.* at 105-106, 100 S.Ct. at 943, 63 L.Ed.2d at 243.

⁸ The City has enacted a moratorium on the expansion of cable television enterprises for a period of three months to give the City Council time to draft a model cable television ordinance and to invite new businesses to enter the market. The only existing cable television company in Boulder, Community Communications, sought injunctive relief to prevent the ordinance enacting the moratorium from taking effect.

necessary for anticompetitive conduct to be protected under *Parker*. The Court found that the Home Rule Amendment was neutral with respect to the challenged activity and rejected the City's contention that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances.

III.

The issue before the Court is to determine if the refusal of the City of Eau Claire to provide sewage treatment facilities to the Towns falls within the protection of *Parker v. Brown* as interpreted in *City of Lafayette* and *City of Boulder*. The holdings of these cases require that municipalities act pursuant to a clearly articulated and affirmatively expressed state policy. Before determining if such a state policy exists, we must resolve two preliminary issues.

First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation. The Towns argue that the district court erred in characterizing the anticompetitive conduct which must be pursuant to state policy as "the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation." According to the Towns, the City must point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation.

We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessari-

ly must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384. In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization.⁹ The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing effect that results from refusing to provide these services. If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity.¹⁰

⁹ See *Antitrust Immunity*, 95 Harv. L. Rev. at 445-46 (1981): "The Supreme Court has found it sufficient that 'the legislature contemplated the kind of action complained of'. A policy to displace antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* (quoting *City of Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384).

¹⁰ See P. Areeda, *Antitrust Law* § 212.3a, at 53-54 & n.8 (Supp. 1982) ("The courts have recognized that state statutes need not confer authorization expressly. It would be sufficient, the Supreme Court said, that 'the legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity.").

The second preliminary issue is the contention of the Towns that the City must point to a state policy *directing* or *compelling* the challenged conduct to gain *Parker* protection. There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed. 572, 587 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600, 96 S.Ct. 3110, 3122, 49 L.Ed.2d 1141, 1155 (1976), which appeared to require state compulsion as a prerequisite for municipal immunity. We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Recent Supreme Court cases support our conclusion that compulsion is not required. The Court in *City of Boulder* and *City of Lafayette* explained that a state must

only authorize the municipal activity for the *Parker* exemption to apply,¹¹ and many commentators have rejected the notion that compulsion is required.¹² Obviously, if the state compels or directs a municipality to undertake anticompetitive conduct, this compulsion or direction is strong evidence of a state policy to displace the antitrust laws. We hold that the City must show only that

¹¹ The court stated in *City of Boulder*:

Moreover, judicial enforcement of Congress' will regarding the state action exemption renders a state "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivision in exercising their delegated power must obey the antitrust laws."

455 U.S. at 56-57, 102 S.Ct. at 843, 70 L.Ed.2d at 822 (citations omitted) (emphasis supplied).

In *City of Lafayette*, the Court stated:

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.

435 U.S. at 416-17, 98 S.Ct. at 1138, 55 L.Ed.2d at 385 (emphasis supplied), quoted in *City of Boulder*, 455 U.S. at 57, 102 S.Ct. at 844, 70 L.Ed.2d at 822.

¹² See P. Areeda, *Antitrust Law* § 212.5 (Supp. 1982); M. Handler, *Reforming the Antitrust Laws* 64-65 (1982); *Antitrust Immunity*, 95 Harv.L.Rev. at 445 ("Lafayette does not require that governmental acts be compelled or supervised by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws.") (emphasis supplied); Page, *Antitrust Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099, 1122 n.141 (1981).

clearly articulated and affirmatively expressed state policy authorizes the City's refusal to provide sewage treatment to the Towns to gain the state action immunity of *Parker*.

IV.

The Towns contend that the City's refusal to extend sewer services to them is not pursuant to clearly articulated and affirmatively expressed state policy. We disagree. Several statutes and court decisions interpreting those statutes give the City authority to decide where to extend sewer services and to insist on annexation as a condition to extending sewer services to the surrounding area.

Section 66.069(2)(c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area.¹³ This statute authorizes the City to fix the limits of its utility service and expressly provides that the City "shall have no obligation to serve beyond the area so delineated." In addition, section 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewerage system to a town, but if that town then refused to become

¹³ Section 66.069(2)(c) provides:

Notwithstanding § 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

We note that § 66.069(2)(c) applies to water utilities. Its provisions, however, are incorporated into the statute governing municipal sewage systems by § 66.076(8).

annexed to the city, the order becomes void and the city has no obligation to extend the sewerage system.¹⁴ This statute is evidence of a state policy to require annexation as a condition to receiving municipal services.

Our conclusion that state policy authorizes the City to refuse sewage treatment services unless the purchaser becomes annexed is strengthened by the holding of *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The Town of Hallie brought suit against Chippewa Falls under the state antitrust laws for the refusal of Chippewa Falls to provide sewage treatment facilities to the Town of Hallie unless the Town agreed to obtain other municipal services from Chippewa Falls. When the Town did not agree, the City annexed a portion of the Town. The court relied on the broad home

¹⁴ Section 144.07 provides:

An order by the department for the connection of unincorporated territory to a city or village system or plant shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under § 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under § 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum under § 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 90-day period, the order shall be effective.

The constitutionality of § 144.07(lm) was upheld in *City of Beloit v. Kallas*, 76 Wis.2d 61, 250 N.W.2d 342 (1977). The court held the statute balanced and accommodated two matters of state concern: providing vital services to areas surrounding cities and the growth or expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.

rule provisions under Wisconsin law and §§ 66.029(2)(c) and 144.07(lm) to hold that state antitrust law did not apply to this conduct. The court stated:

Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area. . . .

While the facts of the present case are clearly not covered by this statute because no DNR order is involved, [sec. 144.07(lm)] is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

314 N.W.2d at 325-26.

The *Town of Hallie* decision and the statutes that it interprets show that there is a clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services unless they can annex the territory that they service. The City acted pursuant to and in a manner consistent with this policy by refusing to provide sewage treatment services to the Towns unless they agreed to become annexed and acquire the full range of sewage services. We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in furtherance of clearly articulated and affirmatively expressed state policy.

V.

The Towns contend that the State of Wisconsin must actively supervise the anticompetitive conduct for the City to gain the protection of *Parker v. Brown*. The "active state supervision" requirement arose in *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Midcal* involved a California statutory scheme allowing private wine suppliers to establish a program of resale price control to be enforced by the state. The State of California neither established nor reviewed the prices set by these private decision makers. The Supreme Court struck down the state law because it created a private price-setting mechanism that the state did not supervise. The Court concluded, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943, 63 L.Ed.2d 243.

We do not conclude that *Midcal* requires active state supervision over the conduct in this case.¹⁵ The *Midcal*

¹⁵ In the *City of Boulder*, the Supreme Court left open the question whether a municipality must show active state supervision over its conduct in order to receive immunity under *Parker v. Brown*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*." *City of Boulder*, 455 U.S. at 51 n.14, 102 S.Ct. at 841 n.14, 70 L.Ed.2d at 819 n.14.

In *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10 Cir. 1982), the Court did not require active state supervision for the City of Pueblo to receive *Parker v. Brown* immunity. The conduct in this case involved the City's operation of a municipal airport. The Court concluded that the key inquiry was whether the State of Colorado by affirmative legislative action granted the City

(footnote continued)

case involved private parties that were given power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.¹⁶

(footnote continued)

an exemption from the operation of the antitrust laws by virtue of statutory language giving municipalities the authority to acquire and operate a municipal airport. Under this standard, the Court held the City's conduct to be exempt from the antitrust laws.

¹⁶ See P. Areeda, *Antitrust Law* § 212.2a, at 47 (Supp. 1982) ("Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct: it tests whether challenged local activity is truly state action and therefore entitled to immunity."); *Antitrust Immunity*, 95 Harv. L. Rev. at 445 & n.49 ("Lafayette does not require that government acts . . . be supervised by the state.") ("a few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active public supervision of private parties) to require state supervision of governmental defendants"); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L. J. 305, 340-342 ("It is questionable whether a showing of active state supervision is necessary for political subdivisions to gain *Parker* immunity, however, in spite of the seemingly unequivocal language of *California Retail Liquor*"). For an argument that the Supreme Court should abandon the active state supervision requirement completely, see Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099 (1981).

We also conclude that requiring active state supervision over a traditional municipal function would be unwise. A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness.¹⁷ We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability.

We hold, therefore, that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity.¹⁸ The only re-

¹⁷ See *City of Boulder*, 455 U.S. at 71 n.6, 102 S.Ct. at 851 n.6, 70 L.Ed.2d at 831 n.6 (Rehnquist, J., dissenting) ("The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.")

¹⁸ We reserve the question whether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive *Parker v. Brown* immunity. This reflects our belief that traditional municipal activity undertaken pursuant to clearly articulated and affirmatively expressed state policy and designed to promote public health and safety should be free from antitrust attack. When municipal activity strays from these functions, which includes the provision of basic services such as sewerage and sanitation, there is a more significant threat to free competition that may warrant active state supervision. See *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 62, 171-273 (1982).

quirement for receiving immunity when a traditional municipal function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy. We do not question the holding of *Midcal*, but we conclude that the Court's concerns with the private price-fixing arrangement in that case are not present when local governments created by state law carry out governmental functions pursuant to clearly articulated and affirmatively expressed state policy.

VI.

Our examination of Wisconsin statutes and case law reveals that the challenged conduct is in furtherance of a clearly articulated and affirmatively expressed state policy. On the facts of this case, we conclude that the City must make no other showing to be entitled to immunity under *Parker v. Brown*. We hold that the district court properly dismissed the antitrust counts against the City, and we affirm the judgment of the district court.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
 Appeals for the Seventh Circuit*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WISCONSIN

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF
 UNION and TOWN OF WASHINGTON,

Plaintiffs,

v.

CITY OF EAU CLAIRE,

Defendant.

DECISION AND ORDER

80-C-527

(Dated April 5, 1982)

Plaintiffs Town of Hallie, Town of Seymour, Town of Union and Town of Washington [Towns] filed this action against defendant City of Eau Claire [City]. The Towns are located directly adjacent to the City. They charge the City with illegally exploiting its monopoly power in sewage treatment to extract profits in sewage collection and transportation. The Towns also assert a claim under the Federal Water Pollution Control Act, as well as a pendent state claim.

The City has filed a motion to dismiss. The motion is granted.

FACTS

For the purposes of this motion, the following allegations in the complaint are accepted as true:

1. Sewage treatment is a three-step process. First, the sewage must be collected from the "user," presumably

a residence or business. Next, the sewage must be transported to a treatment facility. Finally, the raw sewage must be treated and disposed of by the treatment facility.

2. The City is the only entity in the market available to the Towns that has a sewage treatment center. As a result, the City enjoys a monopoly in the market for sewage treatment services.

3. The Towns are potential competitors of the City for the sale of sewage collection and transportation services in the same market.

4. The sale of sewage collection, transportation and treatment services has a substantial impact on interstate commerce.

5. The City used federal funds to construct its sewage treatment service facility.

6. The City has refused to supply sewage treatment services to the Towns. The City has provided such services to individual land owners in the Towns if and only if the owners agree that the City will also provide sewage collection and transportation services by requiring annexation of the owner's land to the City.

OPINION

Counts One Through Four

These counts arise under the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.* In Count One, plaintiffs allege that the City attempted to, and did, acquire a monopoly in sewage treatment services. Count Two alleges that the City has "tied" the provision of sewage treatment services to the provision of collection and transportation services. Count Three alleges an illegal refusal to deal with the Towns. Count Four alleges that the City's conduct has prevented the competition in the market for sewage collection and transportation services.

Defendant has filed a motion to dismiss these counts, asserting several justifications. The Court will address only one of these. The Court agrees that defendant's actions as alleged in the complaint are exempt from the federal antitrust laws. Thus, these counts must be dismissed.

Parker v. Brown, 317 U.S. 341 (1943), first defined the exemption applicable to the City's conduct. *Parker* held that a state agricultural proration program was not within the intended scope of the Sherman Act:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

Id. at 350-51.

In January, the Supreme Court further explained the *Parker* doctrine (that state action is not subject to the Sherman Act) in *Community Communications Company v. City of Boulder*, 50 U.S.L.W. 4144 (January 12, 1982). The City of Boulder had granted a twenty year permit to conduct a cable television business. Plaintiff was assigned the permit in 1966. Plaintiff wished to take advantage of new technology, and, in May, 1979, informed the City Council that it planned to expand its business. Another cable company expressed interest in providing a competing cable television service in Boulder. Boulder responded by enacting an "emergency" ordinance, prohibiting plaintiff from expanding its business for three months. Plaintiff filed suit, claiming a violation of § 1 of the Sherman Act. Boulder argued that it was immune from antitrust violations because of the *Parker* doctrine. The Supreme Court disagreed. *Id.* at 4144-4145.

Justice Brennan, writing for the Court, summarized the appropriate legal test for Sherman Act exemption for a municipality:

Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, [cite omitted], or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, [cites omitted].

Id. at 4146-47.

Justice Brennan first disposed of the argument that Colorado's Home Rule Amendment is a direct delegation of state power to the municipality, thereby immunizing it from antitrust liability under the *Parker* doctrine. "Ours is a 'dual system of government,' *Parker, Supra*, at 351 (emphasis added), which has no place for sovereign cities."

Then, Justice Brennan rejected Boulder's argument that the Colorado Home Rule Amendment's "guarantee of local autonomy" constitutes a "clearly articulated and affirmatively expressed state policy" that justifies the Boulder ordinance.

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here. The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.

. . .

Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 4147-48.

Because Boulder failed to establish that Home Rule powers alone establish that its ordinance furthered or implemented a clearly articulated and affirmatively expressed state policy, the Court did not address the second requirement for exemption from the Sherman Act by municipalities—that the state actively supervise the city's action. *Id.* at 4146, n. 14.

The second requirement was most recently articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). In *Midcal*, an anticompetitive state program for resale price maintenance of wine met the first criteria of the *Parker* doctrine—the state "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *Id.* at 105.

The state program failed, however, to meet the second requirement for exemption from Sherman Act coverage—that the policy is actively supervised by the state. In this case, the

State simply authorized price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. (Footnote omitted). The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state in-

volvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U.S., at 351.

Id. at 105-106

The first issue before the Court, then, is whether the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. The Court holds that it does.

The City correctly identifies a number of statutes which together indicate state sanction and approval of the City's allegedly anticompetitive policy. Individually, the statutes are sufficient. But, viewed together, the statutes justify this assessment by the Wisconsin Supreme Court in a case brought under state antitrust law:

[I]t seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area.

Town of Hallie v. City of Chippewa Falls, 314 N.W.2d 321, 325 (Wis. 1982).

¹ This Court does not rely upon the *Town of Hallie* opinion in this case, which arises under federal antitrust law and presents issues of federalism not present in the state case.

First, the legislature provided that the city may fix the limits of municipal services and that the city shall have no obligation to serve areas outside the city.

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wis. Stat. § 66.069(2)(c). A separate section specifically provided that § 66.069 shall apply to management of a sewage system, Wis. Stat. § 66.076(8). Furthermore, as the City points out, Wis. Stat. § 62.18(1) grants cities the right to build sewers and limit the areas served.

More significant is Wis. Stat. § 144.07. In subsection (1m), the legislature provided that the Wisconsin Department of Natural Resources (DNR) may order a city to connect its sewers to unincorporated areas surrounding the city. If the DNR so orders, the city may annex the unincorporated territory, subject to a referendum by the residents of the territory to be annexed. If the residents of the territory refused to become annexed, the city has no obligation to provide sewer services. This is a clear manifestation of a state policy that a municipality may condition the provision of sewer services on annexation.

The next issue is whether this policy is actively supervised by the state. The Court is satisfied that Wisconsin statutes provide sufficient supervision of the challenged practice to satisfy this requirement.

First, Wis. Stat. § 144.04 requires each city proposing a sewer extension submit a plan to DNR. The city may not extend its sewers without DNR approval. Additionally, DNR may order construction of a municipal sewer system. Wis. Stat. § 144.025(2)(r). Furthermore, DNR may order a city to extend its sewer services extraterritorially, under limited circumstances. Wis. Stat. § 144.07(1).

In addition, Wisconsin has direct supervision over annexations. Before any city may annex, it must consider state advice as to whether annexation is against the public interest. Wis. Stat. § 66.021. See also Wis. Stat. § 66.021 (11)(c)1, requiring the state to consider which government entity could best supply the area to be annexed with governmental services. Finally, Wisconsin courts may invalidate an annexation if the annexation does not meet a rule of reason. See *Town of Pleasant Prairie v. City of Kenosha*, 75 Wis.2d 322, 249 N.W.2d 581 (1977).

Because the City's conduct furthers a clearly articulated and affirmatively expressed state policy, and because the state actively supervises annexation, the City enjoys *Parker* immunity from the Sherman Act. Therefore, these counts must be dismissed.

Count Five

In a separate count, plaintiffs assert that defendant City received federal funds under the Federal Water Pollution Control Act [FWPCA], that the City is required by FWPCA to provide sewage treatment to Towns on a reasonable and just basis, and that the City is not providing these services on such a basis. Defendant has also moved to dismiss this count. The motion is granted.

After a review of FWPCA, 33 U.S.C. § 1281 *et seq.*, the Court cannot find justification for this claim. First, the Towns have not cited, nor is the Court aware of, a provision in the FWPCA authorizing such a suit by "participants" against an uncooperative "applicant."

Furthermore, the Court doubts that this count is ripe for trial. The entire FWPCA contemplates management and implementation by the Environmental Protection Agency [EPA]. 33 U.S.C. § 1281. The Towns have not indicated whether they have pursued their remedy with EPA before seeking the review by this Court.

Finally, the Court can find no mandate to provide services to the Towns in 33 U.S.C. § 1284(b)(1), cited by the Towns.

Count Six

The Towns also assert that the City has a duty to provide sewage treatment to the Towns because the sewage treatment facility has "the nature of a public utility." This is a claim arising under state law. Because all federal claims have been dismissed, Count Six must be dismissed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1955).

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

Entered this 26th day of March, 1982.

BY THE COURT:
/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
For The
WESTERN DISTRICT OF WISCONSIN
CIVIL ACTION FILE NO. 80-C-527

TOWN OF HALLIE, et al,

v.

CITY OF EAU CLAIRE,

Plaintiffs,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's motion to dismiss is granted with costs.

Dated at Madison, Wisconsin, this 5th day of April, 1982.

/s/ Joseph W. Skupniewitz
Clerk of Court

APPENDIX D

15 U.S.C. Section 2

§2 Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Wisconsin Statutes Section 66.069.(2)(c)

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wisconsin Statutes Section 144.07(lm)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject

App. 30

to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

5909

No. 82-1832

Office - Supreme Court, U.S.
F I L E D

JUN 10 1983

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1982

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN
OF UNION and TOWN OF WASHINGTON,

Petitioners,

vs.

CITY OF EAU CLAIRE,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

18pp

FREDERICK W. FISCHER
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Eau Claire, Wisconsin 54701
(715) 839-4907

Attorney for Respondent

QUESTION PRESENTED

The question presented on this petition is as follows:

“Is the practice of the City of Eau Claire to refuse to provide sewer utility services to properties located outside the City, and requiring annexation of such properties in order for them to receive such services, exempt from the application of the antitrust laws under the state action doctrine?”

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No. 82-1832

In The
Supreme Court of the United States
 October Term, 1982

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN
 OF UNION and TOWN OF WASHINGTON,

Petitioners,

vs.

CITY OF EAU CLAIRE,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
 A WRIT OF CERTIORARI**

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals
 appears in 700 F.2d 376 (1983).

STATEMENT OF THE CASE

The four Petitioners, the Towns of Hallie, Seymour,
 Union and Washington, lie adjacent to the City of Eau

Claire. The city constructed a sewage treatment facility with federal funds. This facility is the only sewage treatment facility which is in the market available to the towns. The district and appellate courts found that the providing of sewer service has three elements: collection, transportation and treatment. The towns are potential competitors for the sale of sewage collection and transportation services in the same market. The city refuses to provide treatment services to the towns, requiring instead that properties desiring sewer service must be annexed into the city. This practice is alleged by the towns to be contrary to Section 2 of the Sherman Act (15 USC Section 2). Suit was filed in District Court, Western, District of Wisconsin. The city moved to dismiss the action, claiming, among other things, that its activity was exempt under the "state action" doctrine first enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943).

ARGUMENT

I.

The Seventh Circuit Was Correct In Determining That The Refusal Of The City To Extend Treatment Services To The Towns Was Pursuant To The Clearly Articulated And Affirmatively Expressed Policy Of The State Of Wisconsin.

In their Petition, the petitioning towns contend that the Seventh Circuit Court of Appeals erred in: 1) not finding that the state affirmatively addressed and clearly expressed a state policy displacing competition with mo-

nopoly public service; and 2) by supposedly developing a "new test" for determining exemption from the anti-trust laws, "which accepts state neutrality as sufficient" and is thereby in "direct conflict" with the court's holdings in *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978), and *Community Communications Co. v. City of Boulder*, 445 U.S. 40, 102 S.Ct. 835 (1982). (p. 11, Petition).

This case involves the simple matter of whether or not a municipality can refuse to extend municipal sewer service to surrounding towns without violating the Sherman Act. Contrary to Petitioners' assertions (p. 11, Petition), the Court of Appeals expressly answered the issue of whether or not this practice was pursuant to an affirmatively expressed and clearly articulated state policy. The Seventh Circuit, following an analysis of the pertinent Wisconsin statutory and case law, affirmatively held as follows:

"We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in furtherance of clearly articulated and affirmatively expressed state policy." (App. 14, Petition).

The Petitioners allege that the foregoing finding provides antitrust exemption to the Respondent under a "neutral" state policy. However, the Seventh Circuit, rejecting Petitioners' claim that state compulsion or direction is required for exemption, properly determined that Wisconsin state law affirmatively contemplated and authorized the city's challenged practice, thus exempting it from antitrust scrutiny.

The City's refusal to extend its services extraterritorially was found by the Seventh Circuit to have been contemplated and authorized by state law. In *City of Lafayette*, the Supreme Court rejected the contention "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit". (Referring to *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943)). The court held that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". *City of Boulder* confirmed this holding, noting that, in order for exemption, the challenged municipal act must be "contemplated" and "comprehended within the powers granted". 102 S. Ct. at 843. The court, in *City of Boulder*, quoting with favor from the decision of the Court of Appeals in that case, described the applicable standard as follows:

"(I)t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent". 102 S. Ct. at 840, n. 12 (quoting *City of LaFayette v. Louisiana*

Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976)).

The question is thus whether or not the Wisconsin legislature contemplated or comprehended the activity of the City of Eau Claire, and can be answered by a review of state statutory and case law. Two statutes, in particular, and a Wisconsin Supreme Court case involving virtually identical facts, were found to provide ample state authorization.

Section 66.069 (2) (c), Wisconsin Statutes (App. 29, Petition), explicitly recognizes the right of a city to fix the limits of sewer service, which is the same conduct with which Petitioners take issue. This statute expressly permits a city to confine the providing of any sewer service to the city boundary. It clearly contemplates and authorizes the precise action which is challenged here, that a municipality may determine not to extend its services extraterritorially. As the Seventh Circuit noted, "this statute authorizes the City to fix the limits of its utility service".

Wisconsin Statutes 144.07 (1m) was determined by the Court of Appeals to constitute further evidence of state policy. (The text of the statute is contained in App. 29-30, Petition). This statute provides that the state department of natural resources may order extension of the city's sewage system to a town, but if the area subject to the order thereafter refuses to be annexed to the city, the order becomes void and the city is not obligated to extend its system. This statute provides further evidence of legislative contemplation of the contested activity of the city. In the words of the

Seventh Circuit, it "is evidence of a state policy to require annexation as a condition to receiving municipal services".

Section 144.07 (1m) was upheld in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 250 N. W. 2d 342 (1977), the Wisconsin Supreme Court holding that the statute balanced and accommodated two matters of statewide concern: providing vital services to areas surrounding cities, and the growth and expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.¹

In a case not even mentioned by Petitioners, *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N. W. 2d 321 (1982), the Wisconsin Supreme Court provided still further, emphatic support for the City's policy.

¹In *City of Beloit* the court made the following revealing comment as to the problem underlying intergovernmental disputes over annexation and the extension of sewer service, and the reason behind the enactment of section 144.07(1m):

"All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with population densities at or near the normal city level. Even though these fringe areas appear to be a part of the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until a majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load. 250 N. W. 2d at 346.

That case arose under the Wisconsin "Little Sherman Act" (Wisconsin Statutes 133.01, et seq.) on facts which were essentially the same as those presented here. The court, citing sections 66.069 (2) (c) and 144.07 (1m) and the general home rule powers of Wisconsin cities, concluded that:

"... it seems that the legislature viewed annexation by the city as a reasonable quid pro quo that a city could require before extending sewer services to the area." 314 N. W. 2d at 325.

The decision went so far as to specifically hold:

"... a monopoly exercised by the city is more appropriate than competition in the furnishing of such public services, ..." 314 N. W. 2d at 326.

This case could not have been more explicit as to the legislative contemplation of the city's policy.

The towns concede that the foregoing statutes "give cities the authority to engage in conduct which may or may not have anticompetitive effects" (p. 15, Petition). They have likewise abandoned their contention asserted below that legislative direction or compulsion must be present in order for exemption from the Sherman Act. The towns nevertheless argue that under the foregoing general legislative authority, the city is given the option of engaging or not engaging in anticompetitive conduct. They would require that the legislature specifically authorize the anticompetitive conduct itself. This allegation was rejected by the appellate court, the court noting that in *City of LaFayette*, the Supreme Court explicitly stated that no "specific detailed legislative authorization" is required for exemption. All that is required is a determination, from the authority given, that

"the legislature contemplated the kind of action complained of". This test has been reiterated in *City of Boulder*, 102 S. Ct. at 840, n. 12. Moreover, the presumed test espoused by the Petitioners goes too far and would seem to violate the admonition in *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U. S. 97, 100 S. Ct. 937 (1980) (quoting *Parker v. Brown*):

"... a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action as lawful. . . ."

II.

The Decision Of The Court Of Appeals Does Not Accept State Neutrality As Sufficient For Immunity.

The Court of Appeals properly found that the state policy evidenced by the foregoing authority is more than the "mere neutrality" which was found to be insufficient in *City of Boulder*. In *City of Boulder*, there was no "grant" of any specific power by the state to the city and thus no contemplation or authorization of anti-competitive activities. The Supreme Court found "the absence of any regulation whatever by the State of Colorado". As noted by the dissent in the Court of Appeals in *City of Boulder*:

"No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's Constitution or in any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable". 630 F.2d 704, 717 (10th Cir. 1980).

In fact, the City of Boulder had argued that "as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act". 102 S. Ct. at 843.

Here, to the contrary, the Wisconsin statutory and case law cited previously is definitely not "neutral". It constitutes an express grant of authority to the city to engage in the challenged activity. The previously cited statutes and the decision of the Wisconsin Supreme Court in *Town of Hallie v. City of Chippewa Falls*, (supra) belie the concept of neutrality. *Town of Hallie* even held that "the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city". Far from neutrality, the Wisconsin legislative scheme affirmatively contemplates and supports the activity of the City of Eau Claire.

The Petitioners further claim that, under the Seventh Circuit's test, the City of Boulder would have been immune from the Sherman Act (p. 15, Petition). This allegation is misplaced and fallacious. In *City of Boulder*, no statutes or cases concerning cable television existed from which legislative authorization or contemplation could be inferred. The city instead relied entirely upon its general home rule authority, thus prompting the finding of neutrality. However, if facts similar to those in this case had been present in *City of Boulder*, the City submits that the outcome would have been different. If Colorado statutes had existed which contemplated and authorized the imposition of cable television moratoriums and the Colorado Supreme Court had held that those laws constituted legislative intent in support of such moratoriums, the state policy would no longer have been neutral. It would then have been clearly articulated and affirmatively expressed, thus conferring immunity.

III.

The Finding Of "Clear Articulation And Affirmative Expression" By The Court Of Appeals Is Expressed By Other Post-Boulder Decisions.

Since *City of Boulder* was decided, several decisions have been rendered, at the trial and appellate levels, which comport with the reasoning of the Seventh Circuit. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), cert. den., 51 Law Week 3509; *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3rd Cir. 1982), cert. den. — U.S. —, 103 S.Ct. 388 (1982); *Gold Cross Ambulance v. City of Kansas City*, 538 F.Supp. 956 (W.D. Mo. 1982); *All-American Cab Co. v. Metropolitan Knoxville Airport Authority*, 547 F.Supp. 509 (E.D. Tenn. 1982); *Hybud Equipment Corp. v. City of Akron*, Nos. C78-1733A, C78-65A (D.C. N.D. Ohio, April 6, 1983). In each of these cases the state legislative delegation was less precise and specific than in the instant action. *City of Pueblo*, for example, involved a Colorado home rule municipality which undertook to limit the number of fixed base operators at its airport. The statute involved was nothing more than a general enabling act permitting Colorado cities to operate and maintain airports. No mention whatever was made in the statute concerning the limitation of the number of fixed base operators at a municipal airport. The statute was nevertheless found to be clearly articulated and affirmatively expressed state policy and the activity was exempt under the Sherman Act.

As evidenced by the denial of certiorari in two of these cases, *City of Pueblo* and *Euster*, the rationale of the cases appears consistent with *City of LaFayette* and

City of Boulder. The decision of the Seventh Circuit in this action is likewise consistent.

IV.

The Decision Of The Seventh Circuit Does Not Conflict With Ronwin.

Petitioners claim that the finding in *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982) is inconsistent with that of the Seventh Circuit. *Ronwin*, however, was a case where the alleged anticompetitive conduct, permitting a predetermined number of bar applicants to pass the bar exam, was not contemplated or authorized as state policy. In this regard, the Respondent strongly disagrees with Petitioners' claim that it was "foreseeable", judging from the general power over bar admittances delegated to the committee, that the committee would thereby admit only a given number of applicants regardless of achievement. The court in *Ronwin* specifically found that "the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court". The court concluded that "the challenged grading procedure was not clearly articulated or affirmatively expressed as state policy".

The court engaged in a significant discussion as to the apparent existence of an Arizona Supreme Court Rule on grading and a claim that the committee had advised the Supreme Court of its grading policy under this rule. The court refused to consider these facts, but noted:

"Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention."

The decision of the Seventh Circuit is not inconsistent with *Ronwin*. In *Ronwin* no state policy existed (or at least none existed which the court was willing to recognize) which contemplated or sanctioned the challenged grading practice. Had such a policy been in existence, as evidenced by that part of the Ninth Circuit's opinion cited immediately above, immunity would likely have been granted.

As of May 17, 1983 the Supreme Court granted certiorari in *Ronwin* (now *Hoover v. Ronwin*, 51 Law Week 3825). Thus the court will be able to address the question of the degree of specificity in the grant of state authority which is required in order to qualify for state action immunity. However, whether under the rationale expressed in *Ronwin* or in the other cases cited previously, the grant of state authority in the instant case is sufficient to confer immunity.

V.

Active State Supervision Should Not Be Required, At Least Where Traditional Municipal Functions Are Concerned.

No case previously decided by this court has held that the "active state supervision" requirement of *California Retail Liquor Dealers v. Midcal Aluminum*, (supra) applies to local governmental activities. *Midcal* was concerned with the unsupervised activity of private liquor dealers. *City of Boulder* expressly reserved the question "whether the ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*". 102 S. Ct. at 841, n. 14. The dissent in *City of Boulder* recognized

the peculiarity which would result if active state supervision were required of ordinances dealing with local affairs. 102 S. Ct. at 851, n. 6, Justice Rehnquist dissenting. As noted by the Seventh Circuit, active state supervision would be particularly anomalous when a traditional municipal function is involved. If the challenged activity is a traditional municipal activity and authorized by a clearly articulated and affirmatively expressed state policy, which by all accounts is required, active state supervision is unnecessary. Such supervision is also undesirable and unwise due to the resulting erosion, if not outright elimination, of home rule authority and local autonomy in local affairs. In order to eliminate antitrust exposure, all local activities would have to be actively supervised by the state, a concept totally at odds with the idea of local autonomy and home rule. Finally, the courts would be faced with deciding the thorny issue of how much state control constitutes "active supervision" of any given municipal activity.

The holding of the Seventh Circuit has found support in other cases arising since *City of Boulder*. In *Pueblo Aircraft Service, Inc.* (supra), no active state supervision was required in order for immunity to attach. As previously noted, certiorari has been denied in this case. *City of Akron* (supra) is likewise in accord, the district court citing the Seventh Circuit's decision.

VI.

The Decision Of The Seventh Circuit Is Consistent With The Boulder Decision And Does Not Create A "Serious Chink" In The Antitrust Laws.

The Petitioners claim that the decision of the Seventh Circuit results in granting "special status" to local

units of government, leaving them "free to make economic choices" which are contrary to the antitrust laws (pp. 20-21, Petition). However, this contention is essentially an argument against the state action exemption itself. The Petitioners' claim loses sight of the fact that, under the state action doctrine, a state may legitimately authorize local governments to make anticompetitive decisions which would otherwise be contrary to the antitrust laws. As long as the municipal action is pursuant to a clearly articulated and affirmatively expressed state policy it is immune from antitrust challenge. The decision of the court of appeals is consistent with this requirement. The court's decision does not constitute a test of "neutrality" but instead requires the affirmative state recognition of municipal power and authority to act in an anticompetitive manner. The spectre raised by Petitioners that the Seventh Circuit decision will permit "thousands upon thousands" of local governments to violate the antitrust laws with impunity is completely inaccurate and utterly without merit. Such a consequence will be no more possible under the decision of the Seventh Circuit than under *City of LaFayette* and *City of Boulder*.

CONCLUSION

Based upon the foregoing, the Respondent City of Eau Claire respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 82-1832

Office Supreme Court, U.S.
FILED

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ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

— o —
TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION and TOWN OF WASHINGTON,
Petitioners,

v.

CITY OF EAU CLAIRE,
Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

— o —
BRIEF OF PETITIONERS
— o —

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QUESTIONS PRESENTED

The Court of Appeals ruled that the City's anticompetitive conduct was exempt from the Sherman Act, relying on its formulation of the *Parker v. Brown* test. The questions presented are:

1. If a state statute permits a city to engage in conduct which, under some circumstances, may be anticompetitive in violation of the Sherman Act, is it proper for the court to assume the state contemplated such anticompetitive conduct and infer that the State condones it?
2. If it is proper under circumstances identified in question one for the court to infer that the State condones certain anticompetitive conduct, is this inference sufficient to meet the "clearly articulated and affirmatively expressed" state policy test defined by this Court?
3. Does the fact that a person engaging in anticompetitive conduct is a municipality eliminate the requirement that the anticompetitive conduct be "actively supervised by the State"?

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No. 82-1832

In The
Supreme Court of the United States
October Term, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION and TOWN OF WASHINGTON,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF OF PETITIONERS

This Brief on the Merits is filed on behalf of Petitioners, the Wisconsin townships, Town of Hallie, Town of Seymour, Town of Union and Town of Washington.¹

¹The parties named in the caption are the only parties to this litigation.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 700 F.2d 376 (7th Cir. 1983) and included at pages 26-44 of the Joint Appendix (J.A. 26-44). The decision and judgment of the United States District Court for the Western District of Wisconsin are unreported and included at pages 13-23 and 25 of the Joint Appendix (J.A. 13-23, 25).

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). The Petition for Writ of Certiorari was filed May 11, 1983, within 90 days of the February 17, 1983, Opinion and Judgment of the Court of Appeals for the Seventh Circuit. Certiorari was granted on June 11, 1984.

STATUTES INVOLVED

This case concerns §2 of the Sherman Act, 15 U.S.C. §2 and WIS. STAT. §§66.069(2)(c), 66.076(1), 144.07(1m) and 196.58(5). All Wisconsin statutes are the 1981 compilation. These statutes are reprinted in the Appendix of Statutes.

STATEMENT OF THE CASE

The Towns of Hallie, Seymour, Union and Washington ("Towns") filed a complaint against the City of Eau Claire ("City") alleging that the City violated the Sherman Act by using its monopoly over sewage treatment services to gain monopolies in sewage collection and transportation services. Complaint, J.A. 2-9. The United States District Court for the Western District of Wisconsin granted the City's motion to dismiss for failure to state a claim upon which relief may be granted under Fed.R.Civ. Pro.12(b) (6). Decision and Order of the District Court, J.A. 13-23, 25. The United States Court of Appeals for the Seventh Circuit affirmed, J.A. 26-44; 700 F.2d 376 (7th Cir. 1983). The Towns filed a Petition for Certiorari on May 11, 1983, which was granted on June 11, 1984.

The Towns alleged that the City violated §2 of the Sherman Act, 15 U.S.C. §2. Claims I-IV of the Complaint, J.A. 2-6. The Towns' complaint alleged that the City constructed a regional sewage treatment facility with federal funds. Although this facility is located within the City and is owned and operated by the City, it was designed and intended to serve the geographic region consisting of the City and the Towns. This facility is the only sewage treatment facility in the market available to the Towns and, as a result, the City enjoys a monopoly in the market for sewage treatment services in the geographic market in which the Towns are located.

The sale of sewage services involves three steps. First, the sewage must be collected from the user. Second, it must be transported to a treatment facility. Third, it

must be treated and disposed of at the treatment facility. Each step in the process requires that the next succeeding step of service be available.

The Towns are actual or potential competitors with the City in the market for sewage collection and transportation services in the geographic market in which the Towns are located and in which the City holds a monopoly over sewage treatment services. However, the Towns can sell sewage collection or transportation services only if they can purchase treatment services from someone else.

The City's anticompetitive conduct in violation of the Sherman Act is the monopolization of collection and transportation services in the Towns. The City offers to sell such services, as well as treatment services, to persons located in the Towns but refuses to sell treatment services to the Towns—its potential competitors for the sale of collection and transportation services. By refusing to sell treatment services to the Towns, the City has prevented the Towns from competing with the City in the markets for collection and transportation services. Since the Towns have no means of disposing of the sewage other than the City's facility and since the City will not sell them treatment service, the Towns cannot collect sewage and have no place to which to transport it. The result is the City has monopolized collection and transportation services by its use of its monopoly power in treatment services.

In addition, the Towns alleged a pendent state law claim that the City had assumed a duty to serve the areas constituting the Towns, a duty in the nature of a

public utility and the City was not fulfilling its duty. Claim VI of the Complaint, J.A. 7.²

The City filed a motion to dismiss pursuant to Rule 12(b)(6) of the Fed.R.Civ.Pro., J.A. 10-12, arguing that the City's acts were not subject to the Sherman Act under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In its Decision and Order of April 5, 1982, the District Court agreed with the City and granted the motion to dismiss. J.A. 13-22, 25. A judgment was entered that same date. J.A. 23.

The Towns appealed, J.A. 24, and on February 17, 1983, the Court of Appeals affirmed the District Court's judgment, J.A. 26-44. The Seventh Circuit acknowledged that the *Parker v. Brown* test requires that the City's anticompetitive conduct be authorized by the State pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly service. J.A. 33. The Seventh Circuit held WIS. STAT. §§66.069(2)(e) and 144.07(1m) satisfied this requirement, although neither addresses nor expresses a policy that the City provide these services on a monopoly basis.

In reaching this result, the Seventh Circuit held that the State need not express a policy authorizing the City to displace competition in sewage service with monopoly service. Instead, all that is required is that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services" because the Court then "can assume that the State contemplated that anticompetitive effects might result from

²The dismissal of Claim V of the Complaint, based on the Federal Water Pollution Control Act, J.A. 6-7, is not pursued on appeal.

conduct pursuant to that authorization" and having made that assumption the Court "can infer that it [the State] condones the anticompetitive effect." J.A. 34. The Seventh Circuit held this sufficient to meet the "clear articulation and affirmative expression" test of *Parker v. Brown*. J.A. 34-37.

The Seventh Circuit acknowledged that *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum*, 445 U.S. 97 (1980), requires "active state supervision" for exemption under the *Parker v. Brown* test. The Seventh Circuit held that this holding in *Midcal* only applies to private parties. The Seventh Circuit held municipalities are immune under *Parker v. Brown* if they meet the clear articulation and affirmative expression standard, even though there is no active state supervision. J.A. 40-44.

The Petition for Certiorari, raising the issue of the legal standard used by the Seventh Circuit, followed.

SUMMARY OF ARGUMENT

I. The District Court dismissed this action on the basis of the pleadings. Fed.R.Civ.Pro. 12(b). Whether the City is entitled to State action immunity as a matter of law must therefore be determined by accepting the allegations of the complaint as true. The complaint alleges the City unlawfully acquired a monopoly in sewage treatment services to monopolize sewage collection and transportation services in the unincorporated areas surrounding the City, and that the City has since used that monopoly power for that purpose. The result is that the City's anticompetitive conduct has eliminated the Towns as potential competitors for provision of sewage collec-

tion and transportation services in these unincorporated areas.

II. The sole purpose of the *Parker* exemption is to shield the sovereign States from an unintended intrusion on their sovereignty by the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). As a result, cities are not exempt from the antitrust laws. *Community Communications v. Boulder*, 455 U.S. 40, 50-51 (1982). However, the Court recognized that sovereign States frequently choose to implement their policies through State agencies, municipalities and private persons. Such persons, otherwise subject to the antitrust laws, are exempt only while acting on behalf of the State, at the State's direction, to implement the State's policy. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408-417; *Boulder*, 455 U.S. at 51-56. This exemption is to avoid an indirect impairment of the State's sovereignty and is not to protect the nonsovereigns *per se*.

The objective of any test for exemption must be to distinguish anticompetitive conduct attributable to the sovereign State from other anticompetitive conduct. This depends upon the State's involvement in the conduct and not the public or private nature of the person claiming exemption. Therefore, a single standard for exemption should exist.

The identification of anticompetitive conduct attributable to the State is best accomplished through the first prong of the *Parker* exemption test. Responsibility for the particular anticompetitive conduct is identified most clearly by determining who initiated the policy requiring the anticompetitive conduct and who directed that the policy be implemented. The Seventh Circuit's test as-

sumes the State initiated the policy requiring the anti-competitive conduct in question, without evidence that this is true. It accepts State indifference for the State's direction. The result is that cities are permitted to pursue their own parochial interests, contrary to the anti-trust laws, when the State's sovereignty neither requires nor receives protection.

When a nonsovereign is acting as the owner and provider of a service, the proper test requires that a State policy to displace the competition in question be affirmatively and clearly expressed in the State's statutes. Mere State neutrality is insufficient, *Boulder*, 455 U.S. at 55-56, because the State's sovereign policy must conflict with the enforcement of the Sherman Act. If the State is neutral or indifferent, enforcement of the Act will not materially impair the State's policy. Second, the anticompetitive conduct must necessarily follow from the State's clearly articulated policy. Unless this is so, there is no assurance that the anticompetitive conduct is attributable to the State, nor can it be said that restraining this conduct will impair the State's sovereign policy. Any lesser test would call for speculation on the State's involvement in the anticompetitive conduct and would invite the lower federal courts to substitute their judgment of the appropriateness of the particular conduct for that of the State.

III. The Wisconsin statutory scheme for the sale of sewage services, like the home-rule power at issue in *Boulder*, simply delegates decisionmaking authority to local governments. At best, these statutes evidence a State policy of complete neutrality—directing neither monopolization nor competition. These statutes gave the City the opportunity to compete or to engage in anticompetitive

conduct. The decision to engage in the latter was made solely by the City without direction or guidance by the State of Wisconsin. This conduct is not exempt from the Sherman Act.

IV. If the proper test for the first prong of *Parker* exemption is applied, the need for active State supervision is greatly reduced. It would be required only when implementation of the particular activity requires State supervision to assure that the State is the ultimate policymaker. However, if the Seventh Circuit's test is accepted, active State supervision must be required in all cases because it will be the only meaningful nexus between the State and the anticompetitive conduct in question.

V. In this case, Wisconsin's statutes do not provide for nor is there any State supervision of the City's anticompetitive conduct.

The *Parker* exemption does not apply to this case. The dismissal was improper and the case should be remanded for further proceedings on the merits.

ARGUMENT

I. The Towns' Complaint, Which Is To Be Liberally Construed, States A Cause Of Action Under The Sherman Act Unless The City's Actions Are Exempt Under *Parker v. Brown*.

This case comes before the Supreme Court on appeal from decisions granting the City's motion to dismiss the Towns' complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.Pro. 12(b) (6). In such a setting, the Court is to accept as true the material facts

alleged in the complaint. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976). Under the liberal interpretations of complaints required pursuant to the notice pleading of Fed.R.Civ.Pro. 8, a court is not to grant such a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Such a liberal interpretation of the complaint is particularly appropriate in antitrust actions, where "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." *Hospital Bldg. Co.*, *supra*, 425 U.S. at 746.

The essence of the Towns' complaint is the City's abuse of its monopoly in the sale of one type of sewage services (treatment) to gain a monopoly in the sale of other sewage services (collection and transportation). The City has a monopoly in the sale of sewage treatment services in the market available to the Towns. The Towns are potential competitors with the City in the sale of sewage collection and transportation services in that same market. Without the availability of sewage treatment services, the Towns are foreclosed from competing with the City for the sale of sewage collection and transportation services. Thus, the City is using its monopoly in one market to foreclose competition in other markets.³ The City's approach can be simply summarized: "We will sell our monopoly sewage treatment services in the Towns," the City is say-

³The allegations of the complaint fit within the so-called "bottleneck" or "essential facilities" doctrine under antitrust law. E.g., *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1132-33 (7th Cir.); *cert. denied*, — U.S. —, 104 S.Ct. 234 (1983).

ing, "but not to you, Towns, our potential competitors for the sale of sewage collection and transportation services. We will only sell our monopoly services to those who cannot compete with us for other services."

It is clear that, absent the exemption afforded to States under *Parker v. Brown*, 317 U.S. 341 (1943), the City's actions violate the Sherman Act. The illegality of such conduct is unchallenged by the City and is well recognized in the federal decisions.

... [E]ven a *lawful monopolist* may be subject to antitrust restraints when it seeks to *extend or exploit its monopoly* in a manner not contemplated by its authorization. Cf. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-382. (Emphasis added.)

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 417 (1978).

Indeed, the possession of monopoly power in one market may prohibit what otherwise would have been lawful conduct in other markets.

There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 [of the Sherman Act] if done by a monopolist.

Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-12 (7th Cir. 1977), *cert. den.* 439 U.S. 822 (1978). Therefore, the use of an even lawfully acquired monopoly to beget further monopolies or to create other anticompetitive restraints is unlawful. In this case, the Towns do not concede that the City's monopoly in treatment services was lawfully acquired because the Complaint alleges that the City acquired this monopoly with an intent of abusing

that power, itself a violation of the Sherman Act. Complaint, paragraph 15; J.A. 5. See *Times-Picayune Pub. Co. v. U.S.*, 345 U.S. 594, 622-23 (1953); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3rd Cir. 1975).

Anticompetitive conduct which forecloses competition is just as onerous in the eyes of the antitrust laws as anticompetitive conduct which eliminates existing competition. *U.S. v. Griffith*, 334 U.S. 100, 107 (1948); *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973).

The Towns' complaint alleges that the City is using its monopoly power in sewage treatment services to monopolize, i.e., prevent the Towns from competing with the City in the sale of sewage collection and transportation services within the Towns. This conduct clearly violates the antitrust laws unless exempted under *Parker v. Brown*.

II. The First Prong Of The Test For Parker Exemption Requires: (1) That The State As Sovereign Has Clearly Articulated And Affirmatively Expressed Its Own Policy To Displace The Competition Restrained By The City's Anticompetitive Conduct; And (2) That, If Such A State Policy Exists, The State Has Directed Or Authorized The City To Implement That Policy With Anticompetitive Conduct Which Necessarily Follows From The State's Clearly Articulated Policy.

The *Parker* exemption recognizes the fact that Congress did not intend to limit the State's sovereignty by the antitrust laws and is designed to shield the States from an unintended federal intrusion on their sovereignty. *Parker*, 317 U.S. at 350-351. The Court has developed a two-

prong test for *Parker* exemption requiring: (1) that the State as sovereign has "clearly articulated and affirmatively expressed" its policy to displace competition with regulation, including the particular anticompetitive conduct in question; and (2) that the State's policy is "actively supervised" by the State itself. *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.); *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

In *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), J.A. 26-44, the Seventh Circuit fashioned a new test which, if accepted, eliminates the requirement of active State supervision at the same time it wholly eviscerates the concepts of clear articulation and affirmative expression this Court's precedents require. It assumes a State policy to displace competition rather than requiring that the State express such a policy. J.A. 33-34. It accepts as satisfactory State indifference, rather than requiring affirmative State action. J.A. 35-36. The result of this test is that municipalities otherwise subject to the antitrust laws are left free to make economic choices contrary to those laws guided solely by their parochial interests. The Seventh Circuit's test is the antithesis of this Court's test because it casts aside the fundamental economic policy of free competition created by Congress without first determining that the State's sovereignty actually requires or is afforded protection by the exemption.

Since the goal of the *Parker* exemption is to protect the sovereign States from the restraints of the antitrust laws, the test to determine exemption must isolate anticompetitive activity attributable to the sovereign State

from other anticompetitive conduct. This is best accomplished through the first prong of the *Parker* exemption test. First, the State must clearly and affirmatively adopt a policy to displace competition. This is necessary because this State policy creates the conflict between the State's sovereignty and the antitrust laws; this conflict, in turn, generates the need for the State protection afforded by the exemption. Second, the particular anticompetitive conduct involved must necessarily follow from the State's directive to implement that policy. This assures the anticompetitive conduct is attributable to the State and is not the act of another. This test would create a single standard applicable to any nonsovereign, public or private, claiming the benefit of the exemption and, at the same time, would greatly reduce the need for the active State supervision prong of the test. This test would assure that the fundamental policy of free competition is displaced only when protection of the State's sovereignty requires it.

A. A nonsovereign person may benefit from the *Parker* exemption only to the extent necessary to protect the State's sovereignty.

As the Magna Carta of free enterprise, the Sherman Act is a carefully studied attempt to bring within the Act every person whose activities might restrain or monopolize commerce among the States. *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533, 553 (1944); *Lafayette*, 435 U.S. at 398. Accordingly, there is a heavy presumption against implicit exemptions from the Sherman Act. *Lafayette*, 435 U.S. at 398-399; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). The Court has already decided that public corporations, including local

government, are subject to the Sherman Act. *Lafayette*, 435 U.S. at 394-408; *Community Communications Co. v. Boulder*, 455 U.S. 40, 50-51 (1982). Therefore, public persons are no more exempt from the Act than are private persons.⁴

An exception to this rule is known as the *Parker* exemption.⁵ This exemption results from the interaction of the already mentioned heavy presumption against implicit exemptions from the Sherman Act with the competing policy that an unexpressed purpose to nullify a State's sovereign power is not lightly to be attributed to Congress. *Parker v. Brown*, 317 U.S. at 351; *Lafayette*, 435 U.S. at 400. As a result:

[r]elying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature. . . . [*Hoover v. Ronwin*, — U.S. —, 52 U.S.L.W. 4535, 4538 (May 14, 1984).]

The goal of the *Parker* exemption is to protect the State's sovereignty from an unintended federal limitation, and the sole entities sought to be protected are the sovereign States.

⁴The same may not be true with respect to remedies available against cities under the Sherman Act or with the determination of whether a particular activity is anticompetitive. *Lafayette*, 435 U.S. at 401-02 and 417 n. 48.

⁵Other exceptions not applicable here are: (1) when Congress subsequently enacts a regulatory program repugnant to the Sherman Act, *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 350-351 (1973); and (2) when concerted efforts are made to influence lawmakers to enact legislation, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

This singular purpose is evidenced by limitations the Court has placed on the exemption. Since protection of the State's sovereignty is the end sought, a State itself is shielded from liability solely when acting as a sovereign. *Parker*, 317 U.S. at 352; *Boulder*, 455 U.S. at 48-49; *Ronwin*, — U.S. —, 52 U.S.L.W. at 4539. Likewise, just as a State cannot confer its sovereignty on others, a State cannot confer its *Parker* exemption on others by authorizing them to violate the Sherman Act or by declaring their conduct lawful.⁶ However, this does not mean that anticompetitive programs created by a State acting as a sovereign may not be implemented by the State through other public or private persons.

Under the *Parker* exemption, persons otherwise subject to the Sherman Act are exempted from the Act while acting on behalf of the State, at the State's direction or authorization, to carry out the State's policy to displace competition with regulation or monopoly service. *Lafayette*, 435 U.S. at 408-17; *Boulder*, 455 U.S. at 52-56. This is

... simply a recognition that a state may frequently choose to effect its policies through the instrumentality of its cities and towns. [*Boulder*, 455 U.S. at 51.]

The same is true with respect to State agencies and private persons. *Parker*, 317 U.S. at 352; *Cantor v. Detroit*

⁶True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47. . . . [*Parker*, 317 U.S. at 351.]

See also, *Lafayette*, 435 U.S. at 415 fn. 45; and *Boulder*, 455 U.S. at 55-56.

Edison Company, 428 U.S. 579, 592-93 (1976); *Goldfarb*, 421 U.S. at 791; and *Midcal*, 455 U.S. at 104.

However, it must be remembered that any exemption conferred on nonsovereign persons is not for the purpose of protecting the nonsovereign *per se*. Congress intended that these nonsovereigns be subject to the Act. *Lafayette*, 435 U.S. at 394-408; *Boulder*, 455 U.S. at 50-51. Rather, their exemption is incidental to protecting the State's sovereignty, which is the sole basis for the *Parker* exemption.

B. Unless the State as sovereign has adopted a policy to displace the competition restrained by the City's anticompetitive conduct, there is no conflict between the State's sovereignty and the Sherman Act requiring protection of the State's interests.

Since the policy underlying the *Parker* exemption is to protect the State's sovereignty from an unintended intrusion by enforcement of the Sherman Act, a conflict between an exercise of the State's sovereignty and the Sherman Act must exist before the exemption is applicable. Whether such a conflict exists is unrelated to the nature of the nonsovereign instrument the State may select to implement its policy.⁷ The only relevance the nonsovereign has to this issue is that its anticompetitive *activity* defines the area of potential conflict between the exercise of the State's sovereign power and the Sherman Act.

⁷Logic dictates that neither: (1) the clarity of the State's policy to displace competition; (2) the State's interest in seeing that policy protected; nor (3) the impairment of the State's sovereignty, if its policy is not protected from operation of the Sherman Act, depend upon the nature of the person purporting to implement the State's policy.

The State's sovereignty is not impaired by enforcement of the Sherman Act unless: (1) the State has exercised that sovereignty; and (2) this exercise of sovereignty conflicts with and cannot be carried out if the provisions of the Sherman Act are enforced. The policy of the antitrust laws is to assure free competition. Therefore, unless the State as sovereign adopts a policy to displace that competition, no material conflict exists between the State's sovereignty and the antitrust laws justifying exemption of the nonsovereign's anticompetitive conduct.

The need for this conflict was discussed most fully in *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976).⁸ Although the utility was subject to State regulation and could not adopt the program without State agency approval, which it had, the Court held that the utility was not exempt from the Sherman Act.

The Court reasoned that the

mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. [*Cantor*, 428 U.S. at 596.]

For exemption it first must be determined that

⁸*Cantor* was decided before *Lafayette* and therefore did not discuss exemption in the context of public entities being subject to the Sherman Act. In light of *Lafayette* and *Boulder*, the reasoning of *Cantor* applies to public entities as well as private ones.

... exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary." [*Cantor*, 428 U.S. at 597.]

When the State's policy was compared to that of the antitrust laws the Court found that the State had not created a policy to displace competition in the market in question. *Cantor*, 428 U.S. at 592-598. Therefore, no exemption was necessary because enforcing the antitrust laws left the State's interest in regulating utilities almost entirely unimpaired. *Cantor*, 428 U.S. at 598.

The need for this conflict is reflected in this Court's consistent identification of the requisite State policy as a policy to "displace competition with regulation or monopoly service." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *Lafayette*, 435 U.S. at 413; *Midcal*, 445 U.S. at 105; and *Boulder*, 455 U.S. at 51.⁹

⁹In each case in which exemption was granted, the State clearly and affirmatively had adopted a policy to displace the competition in question. In *Parker* it was the command of the State which displaced competition among the growers. *Parker*, 317 U.S. at 346. In *Bates*, the restraint was the affirmative command of the sovereign state. *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-360 (1977). In *Orrin W. Fox Co.*, the sovereign state:

clearly articulated and affirmatively expressed [a system of regulation] designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. [*Orrin W. Fox Co.*, 439 U.S. at 109.]

In *Midcal*, although the second prong of the *Parker* exemption was not met, the first was because the State's "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *Midcal*, 455 U.S. at 105. In each case in which exemption was denied, the State had acted in some

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Most recently it was described as a policy "to replace competition with regulation." *Ronwin*, — U.S. —, 52 U.S.L.W. at 4538. This description has been consistent regardless of whether the nonsovereign was a State agency, municipality or private person. This is so because it is the State's policy to *displace competition* which creates the conflict between the antitrust laws and the State's sovereignty which the *Parker* exemption is intended to resolve.

The Seventh Circuit's test fails to make any meaningful determination of whether the State has decided to replace competition with regulation. In fact, the Seventh Circuit refused to focus on this issue. J.A. 33-34. Instead, the Seventh Circuit focused on a delegation of power to the City, assumed the State has considered the displacement of competition and then imputes the City's policy decision to displace competition to the State. J.A. 34-35, 37-40. This test is erroneous because it assumes the very thing it purports to determine.

The State's policy must be determined by what the State as sovereign has said, not by what the City has done. Otherwise, the State's policy is bounded only by the limits of the cumulative imagination of its cities. In reality, the Seventh Circuit's test determines whether the City has

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manner in the area in question but had not established a policy to displace the competition in question. In *Goldfarb*, the State as sovereign (in this case its Supreme Court) had directed the State Bar to adopt rules as a State agency but had not created a policy to displace price competition among attorneys with binding price fixing. *Goldfarb*, 421 U.S. at 789, 790. In *Boulder*, it was assumed the State had a policy that cities regulate cable television within the city boundaries but there was insufficient evidence to find that the State had established a policy that competition be displaced in that market. *Boulder*, 455 U.S. at 54-57. In *Lafayette*, the case was remanded to see if such a State policy existed. *Lafayette*, 435 U.S. at 413-17.

adopted a policy to displace competition, not whether the State has decided to do so. This is the antithesis of the purposes of the *Parker* exemption.¹⁰

The threshold inquiry must be whether the State has decided to displace the competition in question with regulation or monopoly service. When the sovereign State has acted through its legislature, this State policy must be found in the State's statutes. Unless the State has "clearly articulated and affirmatively expressed" this policy, there is no evidence that enforcement of the Sherman Act will materially interfere with the State's policies. In that event, no further inquiry is necessary because no basis for applying the *Parker* exemption exists.

C. A State which "condones" its municipalities' anticompetitive conduct has not clearly articulated and affirmatively expressed a policy to displace competition.

When the State's policy is neutral regarding the displacement of competition, this Court has held that:

To permit municipalities to be shielded from the anti-trust laws in such circumstances would impair the goals Congress sought to achieve by those laws, *see, supra*, at 403-408, without furthering the policy underlying at the *Parker* "exemption". [*Lafayette*, 435 U.S. at 414-415 (plurality opinion).]

Therefore, when State policy is neutral, the State's municipalities must comply with the Sherman Act. *Lafayette*,

¹⁰The *Parker* doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer State regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the nations free market goals. [*Lafayette*, 435 U.S. at 415-416 (plurality opinion).]

435 U.S. at 414-415 and 415 fn. 45; *Boulder*, 455 U.S. at 55-56.

The Seventh Circuit's test is the embodiment of the concept of neutrality rejected by this Court. First, the Seventh Circuit assumes that the State legislature has affirmatively considered the displacement of competition because a city has found a way to use a delegated power in an anticompetitive fashion. J.A. 34-35. It is just as likely that the legislature delegated the particular authority without considering the possibility that a municipality would impose a restraint of the type engaged in. Unless the words or history of the State statutes clearly indicate the legislature actually had contemplated the displacement of competition, there is no basis for finding that the State has "affirmatively" addressed the issue.

Having assumed the legislature addressed the displacement of competition, the Seventh Circuit infers the State "condones" an anticompetitive use of the delegated power and accepts this as sufficient for exemption. J.A. 35-36. Using this analysis, if the delegated power is also capable of being used in a competitive manner, the Court must also infer the State "condones" the competitive use of the delegated power. If this is so, the State's position is one of precise neutrality.¹¹ If the State merely "condones" the policy decisions of others, it cannot be said that the State itself has made the policy decision to displace competition. Just the opposite is true. The State has decided not to make this decision.

¹¹Stated another way, the legislature may have considered the restraint and neither wished to impose it as State policy nor wished to prohibit it.

These matters were directly addressed in *Boulder*. In *Boulder* the Court assumed the State of Colorado had delegated the authority to Boulder to enact the moratorium ordinance under challenge. *Boulder*, 455 U.S. at 53, fn. 16. Boulder argued that because the State granted it the power to enact this ordinance, the State "contemplated" Boulder's enactment of an anticompetitive program. *Boulder*, 455 U.S. at 54-55.¹² The Court rejected this argument, finding Colorado's policy neutral on the subject.

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*" since the term "granted" necessarily implies an affirmative addressing of the subject by the State. [*Boulder*, 455 U.S. at 55.]

The question is whether the State has adopted a policy to displace the competition in question. This must be determined from the State's legislative declarations. If the State has not clearly articulated and affirmatively expressed its own policy to displace competition, enforcement of the Sherman Act does not impair the State's sovereignty.

¹²*Boulder* also argued that it should be inferred from the authority given Boulder to regulate cable television that the legislature "contemplated" the kind of action complained of. *Boulder*, 455 U.S. at 55.

- D. If the requisite State policy exists, the City must also establish that the State has selected the City to implement that policy and that the particular anticompetitive conduct in question necessarily follows from the State's clearly articulated policy.**

It is not enough to establish that the State has a policy to displace competition. To be exempt, the City must also establish that the State has directed the City to implement that policy with the particular anticompetitive conduct in question.

. . . [W]hen the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. [*Lafayette*, 435 U.S. at 416; *Boulder*, 455 U.S. at 57.]¹³

The need for State direction in this regard does not appear to be in dispute. It is the nature and clarity of the direction which is disputed. The precise question presented is: What State direction is necessary for exemption when a municipality is acting as an owner and provider of a service?¹⁴

¹³*Lafayette* acknowledged that even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization, *Lafayette*, 435 U.S. at 417, and recognized that it would not hinder State governmental programs to require cities authorized to provide services on a monopoly basis to refrain from predatory conduct not itself directed by the State. *Lafayette*, 435 U.S. at 405, fn. 31.

¹⁴In this case, the City is not legislatively regulating local economic or social matters as was the case in *Boulder*. Rather, as in *Lafayette*, the City is acting as an owner and provider of services. For this reason, many of the concerns raised by the dissent in *Boulder*, 455 U.S. at 60-71, need not be addressed here.

At various times, it is said the anticompetitive activity must be "compelled", "directed", "authorized", and "contemplated" by the sovereign State. *Goldfarb*, 421 U.S. at 791; *Lafayette*, 435 U.S. at 416; *Boulder*, 455 U.S. 57. When viewed with the objective of the *Parker* exemption in mind, this language may be reconciled into a single test. Since the objective of the *Parker* exemption is to determine whether the State's sovereignty will be impaired if the particular anticompetitive activity is barred by enforcement of the antitrust laws, the test for exemption should not depend upon the public or private nature of the entity claiming exemption.¹⁵ The Court has already determined that the interests of public entities are no more likely to comport with the policy of the antitrust laws than are the interests of private entities. *Lafayette*, 435 U.S. at 403.

The Court has not laid out separate tests. In *Goldfarb*, 421 U.S. at 791, the Court treated the State agency and the private entity the same. It was not enough that the anticompetitive conduct was "prompted" by State action. The Court held that the anticompetitive conduct,

¹⁵This is best shown by the anomaly resulting from separate tests for public and private entities. Assume a State has decided to displace competition in the electric utility market and has given the same mandate to municipal and private electric utilities to engage in certain anticompetitive conduct to implement that policy. If separate tests are applicable, although the State's mandate is identical, municipal utilities could be exempt while private utilities are not. Is the State's policy impaired any less because private utilities are subject to the antitrust laws rather than the municipal utilities? Obviously not. The disruption of State policy depends upon the need for the particular anticompetitive conduct to implement the State's policy, not upon the nature of the entity carrying it out.

"... must be compelled by direction of the State acting as a sovereign." *Goldfarb*, 421 U.S. at 791. In *Lafayette*, the plurality rejected attempts to distinguish *Goldfarb* and relied on *Goldfarb* in reaching its conclusions. *Lafayette*, 435 U.S. at 411, fn. 41, and 411-12. *Midcal*, which involved private entities, cited and adopted the test described in *Lafayette*. *Midcal*, 445 U.S. at 105. In *Boulder*, the Court applied the test defined in *Lafayette* and adopted *Orrin W. Fox Co.* and *Midcal*. *Boulder*, 455 U.S. at 54. This Court has applied the same test to private and public entities.

In *Lafayette*, the Fifth Circuit's test for determining the adequacy of the State's mandate was accepted. *Lafayette*, 435 U.S. at 415. The Fifth Circuit said:

In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity, to operate in a particular area that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entities' asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. [*Lafayette*, 435 U.S. at 393-394.]

Therefore, the test is a search for evidence that the State has determined that the particular anticompetitive conduct is necessary to implement the State's program.

In this regard, State neutrality regarding the particular anticompetitive conduct is insufficient for *Parker* ex-

emption. *Boulder*, 455 U.S. at 55. As the plurality stated in *Lafayette*, 435 U.S. at 414:

When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state[']s command," or to be restraints that "the state . . . as sovereign" imposed. 317 U.S. at 352. The most that could be said is that state policy may be neutral.

If the State merely "condones" a particular anticompetitive conduct, the State has not decided the conduct is necessary to its program or policy. In such cases, the State has left each city free to make this policy decision on its own. When this is true, barring the anticompetitive conduct interferes with the city's policy. This is not sufficient for *Parker* exemption because the State's policy is not impaired by enforcement of the Sherman Act.

The best evidence that the State has contemplated and decided the City should engage in a particular anticompetitive activity, i.e., express statutory language authorizing the specific conduct, is not required. On the other hand, State neutrality regarding the particular anticompetitive conduct is insufficient for exemption. The question then is where between these two points is the line to be drawn.

The proper test is whether the particular anticompetitive conduct of the city "necessarily follows" from the State's clear, affirmative declaration of State policy. This is the test applied by the Ninth Circuit. *Parks v.*

Watson, 716 F.2d 646, 663 (9th Cir. 1983); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984).¹⁶ This test forms the basis for applying a single test to both private and public nonsovereigns seeking the benefit of the exemption. It balances the need to protect the State's sovereignty with the heavy presumption against implicit exemptions from the Sherman Act. While it would not require the best evidence of State responsibility for the anticompetitive conduct in question, it does give reasonable assurance that the State actually has contemplated the anticompetitive effects of such conduct and has deemed them necessary to implement the State's policy. At the same time, this test would guard against mischief by governmental subdivisions (or private entities) pursuing their own parochial interests.

¹⁶The correct test, articulated in *Parks v. Watson*, should be adopted by this Court to make certain the policy of *Parker* is carried out. The lower federal courts have adopted conflicting tests, some of which do not comport with the purposes of the *Parker* exemption. See *Hallie, supra*; *Parks v. Watson, supra*; *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984) (following *Parks v. Watson*); *City of North Olmstead v. Greater Cleveland Reg. Tran.*, 722 F.2d 1284 (6th Cir. 1983) (action "contemplated" by legislature); *Cen. Iowa Refuse Sys. v. Des Moines Metro. Sol. Waste*, 715 F.2d 419 (8th Cir. 1983) (*Parker* exemption applied when legislature gave a "range of options"); *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *Petition for Cert. filed*, 52 U.S.L.W. 3039 (Aug. 9, 1983) (legislature "affirmatively addressed" competition); *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 762 (1983) (exemption applied when legislature considered action a "governmental function"); *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (absent specific authorization, municipality must demonstrate by "convincing reasoning" that the restraint is necessary to a State policy); *Vickery Manor Service v. Village of Mundelein*, 575 F.Supp. 996 (N.D. Ill. 1983) (attempt to harmonize decisions).

It is difficult to conceive of a meaningful lesser test. Any lesser test would call for speculation on whether the State legislature might have contemplated the conduct and might have deemed it necessary to implement State policy. This is an invitation to the lower federal courts to substitute their judgment of the appropriateness of the particular conduct for that of the State. Just as important, how can it be said that the State's sovereign interests will be impaired by enforcement of the Sherman Act, unless there is concrete evidence the State deems this conduct necessary to its policy or program? The mere possibility of such an impairment is not enough to justify

... the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws ... [*Boulder*, 455 U.S. at 51.]

III. The State Of Wisconsin Has Not Clearly Articulated And Affirmatively Expressed A Policy To Displace The Competition In Question Nor Directed The City To Engage In The Particular Anticompetitive Conduct Involved. At Best, Wisconsin's Policy Is One Of Precise Neutrality.

The Towns have alleged that the City is monopolizing the market for sewage collection and transportation services in the geographic market surrounding the City in violation of §2 of the Sherman Act. The City has done so by acquiring its monopoly in sewage treatment services with an intent to abuse that power, and after acquiring that power, abusing it to monopolize sewage collection and transportation services in the unincorporated areas surrounding the City. The City's anticompetitive conduct has eliminated the competition and potential competition between the Towns and the City for sewage collection and transportation services in this unincorporated area.

The Seventh Circuit, relying on WIS. STAT. §66.069(2)(c) and §144.07(1m), determined that the City's conduct was exempt from the Sherman Act. In doing so, the Seventh Circuit expressly avoided determining whether these statutes evidenced a Wisconsin policy to displace the competition between the Towns and the City. J.A. 33-34. This was necessary because these statutes do not evidence such a State policy. Nor has the State of Wisconsin directed the City to use any delegated power it has to monopolize competition in sewer collection and transportation services in unincorporated areas. Wisconsin's policy is one of precise neutrality. The decision to monopolize these services in the unincorporated areas was made solely by the City to serve the City's interests without any guidance or direction from the State whatsoever. As in *Boulder* 455 U.S. at 55:

[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado [Wisconsin]. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City. (Parenthetical added.)

The City is not entitled to the *Parker* exemption.

A. The Wisconsin Statutes create the very competition restrained by the City's anticompetitive conduct in a scheme which leaves policy decisions to local units of government.

The general Wisconsin statute authorizing municipalities to operate and sell sewer services is WIS. STAT. §66.076, which provides in relevant part:

- (1) In addition to all other methods provided by law *any municipality* may construct, acquire or lease, extend or improve any plant and equipment *within or without its corporate limits* for the collection, transportation, storage, treatment and disposal of sewage, including the lateral, main and interceptor sewers necessary in connection therewith, and any town, village or city may arrange for such service to be furnished by a metropolitan sewage district or joint sewage system. . . . (Emphasis added).

- (1m) In this section 'municipality' means any town, village, city or metropolitan sewage district. . . .

The Wisconsin Statutes create the potential competition between the City and Towns for the provision of sewage transportation and collection services. Both the Towns and City may provide such services in unincorporated areas.

The entire statutory scheme is in accord with §66.076(1) and reflects a state policy to leave questions of municipal sale of sewer services in general — and competition in particular — to the local municipalities.¹⁷

¹⁷The autonomy granted in municipal sales of sewer services is in stark contrast to municipal sales of electric and water services. The State of Wisconsin has established a state policy and regulatory scheme applying to most utility services, reflected in WIS. STAT. Chapter 196. This chapter establishes the Public Service Commission of Wisconsin (PSCW) and grants it broad jurisdiction and powers. WIS. STAT. § 196.02(1). However, the PSCW's jurisdiction over the sale of municipal sewer services is very limited. While some municipal utilities are included within the definition of "public utility" under the statute, municipal sewer services are specifically absent. WIS. STAT. § 196.01(1). The inclusion by Wisconsin of most municipal utility services is unusual. 1 A.J. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, at 26 and note 6 (1969).

(Continued on next page)

The formation of town, village and city utilities to provide sewer services provides that policy decisions are to be made at the local level.¹⁸ The price charged for these services is normally determined by the provider without regulation by the State. WIS. STAT. §66.069 (1)(a); §196.01(1). Part and parcel of this scheme is the local providers' autonomy to decide to whom it will sell.¹⁹ Rather than prohibiting the sale of such services between providers, the Wisconsin statutes specifically provide for it. WIS. STAT. §66.30(2) reads in relevant part:

In addition to the provisions of any other statutes specifically authorizing cooperation between mu-

(Continued from previous page)

The only way the PSCW obtains jurisdiction over some sewer questions is if a complaint is filed with the PSCW, WIS. STAT. § 66.076(9), or where a town, village or city of the fourth class combines its sewer and water utility. WIS. STAT. § 66.077 (2). Even then, the PSCW does not have jurisdiction over the extension of service at issue here. See note 21; *infra*.

¹⁸In addition to § 66.076, see, e.g., WIS. STAT. §§ 66.30-60.316, authorizing sewage services through the formation of town sanitary districts; WIS. STAT. §§ 61.39 and 62.18, further authorizing villages and cities to operate sewers; and WIS. STAT. §§ 66.20-66.26, authorizing the formation of metropolitan sewerage districts.

¹⁹WIS. STAT. §§ 62.18 and 66.069(2) (c), relied on by the Seventh Circuit Court of Appeals, do give municipalities the decisionmaking power to limit their service area. As set forth more fully herein, such statutes do not reach the City's anti-competitive conduct in this case for two reasons. First, the Legislature has expressed neutrality on whether the City is to utilize the powers given—they "may" decide to limit their service area. Secondly, the Legislature has expressed no position on the specific anticompetitive actions of the City in this case: the City is willing to sell sewage treatment services in the areas of the Towns, but only to persons who cannot compete with the City in the sale of collection and transportation services.

municipalities, unless such statute specifically exclude action under this section, any municipality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. . . . This section shall be interpreted liberally in favor of cooperative action between municipalities.

In the context of the entire statutory scheme, the State is completely neutral on whether the City should or should not sell sewage treatment services to the Towns. The statutes evidence no state policy whatsoever that the City monopolize service in unincorporated areas. Rather the statutes create a framework within which competition between cities, towns and villages is likely to occur. The statutes provide a mechanism for cooperation and pro-competitive contracts among these competitors. But the State leaves all policy decisions regarding competition to the local providers. Any decision to monopolize was made by the City without direction or guidance by the State.²⁰

²⁰The statutory scheme of Wisconsin reflected herein is analogous to that considered in *Boulder*. Wisconsin, like Colorado, has "home rule" powers for its cities. In Wisconsin, these "home rule" powers spring from two sources: WIS. CONST. ART. XI, § 3, and WIS. STAT. § 62.11(5) the so-called "statutory home rule" authority. For an excellent analysis of Wisconsin's home rule powers, see Comment, *Conflicts Between State Statute and Local Ordinance in Wisconsin*, 1975 WIS. L. REV. 840, approved by the Wisconsin Supreme Court in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis.2d 518, 534, 271 N.W.2d 69 (1978). Under the analysis of Wisconsin's home rule authority, cities are now held to have the authority to take all acts which the Legislature could authorize them to take, unless specifically withdrawn by statute or constitution. *Id.*, 85 Wis.2d at 532-33; *Wis. Assoc. of Food Dealers v. City of Madison*, 97 Wis.2d 426, 432, 293 N.W.2d 540 (1980). Thus, to the extent statutes discussed herein contain authority which

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- B. The statutes relied on by the Seventh Circuit do not evidence a regulatory scheme to displace competition with state regulation. Quite the contrary, these statutes establish the State has withdrawn from policymaking in these areas and left these decisions to local providers.**

The Seventh Circuit has not found State policy by examining a statutory scheme of regulation. Instead, it has selected several statutes and lifted them out of the context of the State's statutory scheme to justify its conclusion. The statutes relied upon do not even relate to each other. In fact, WIS. STAT. § 144.07(1m), has no application to the facts at hand. This random perusal of the statutes is not what was intended for *Parker* exemption. The search should be for a scheme or system of State regulation to displace competition.

- (1) WIS. STAT. § 66.069(2) (c), does not evidence a state policy to replace competition with monopoly service by the City or direct the City to monopolize such service in unincorporated areas. At best this statute is neutral, leaving the decisionmaking power to the City.**

WIS. STAT. § 66.069(2)(c) evidences no state policy or direction to displace competition. This subsection reads as follows:

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be

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the City might have under its home rule powers, the statutes are merely reiterations of the fact that Wisconsin grants broad autonomy to its municipalities.

provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

The Seventh Circuit Court of Appeals did not find that this statute authorized the anticompetitive conduct of the City. Rather, the Seventh Circuit found that the statute authorized Eau Claire to act in a certain area and that anticompetitive results might flow from such action. The unstated but obvious corollary to the Seventh Circuit's reading of the statute is that such anticompetitive results *might not* flow from the City's action. Nothing in this statute tells the City how to delineate the area it will serve. The inescapable conclusion is that the decision to use this delegated authority in an anticompetitive fashion is made by the City, not the State. Just as in *Boulder*, the City can pursue its course of anticompetitive conduct pursuant to § 66.069(2)(c), while other Cities can pursue free-market competition and both city policies are equally "contemplated" and "comprehended" within the powers granted by the State. *Boulder* 455 U.S. at 56. Acceptance of such a proposition:

would wholly eviscerate the concepts of "clear articulation and affirmative expression". . . .
Boulder 455 U.S. at 56.

In fact, WIS. STAT. § 66.069(2)(c) does not deal with the City's anticompetitive conduct at all. The manifest purpose of WIS. STAT. § 66.069(2)(c) is to deprive the Public Service Commission of Wisconsin (PSCW) of authority to regulate extensions of service to unincorporated areas. Absent the statute, the PSCW would decide

such questions of service extension under WIS. STAT. §196.58(5).²¹ The statute addresses a jurisdictional issue between the PSCW and local bodies, not an issue of competition or lack thereof.²² WIS. STAT. §66.069(2)(c)

²¹WIS. STAT. § 196.58(5) is set forth in the Appendix of Statutes. Because the PSCW does not, as an initial proposition, have jurisdiction over sewage services, note 17, *supra*, § 66.069(2)(c) initially operates to deprive the PSCW only of extension jurisdiction regarding municipal water and electric utilities. To the extent the PSCW may take jurisdiction over sewage service questions as allowed by statute, § 66.069(2)(c) would then operate to deprive it of jurisdiction over issues of extension of sewer services to unincorporated areas.

²²This purpose is evident from the intertwined history of WIS. STAT. §§ 66.069(2)(c) and 196.58(5). Prior to the enactment of § 196.58(5), the Wisconsin Supreme Court held that municipalities had original jurisdiction over extensions of service. *State v. Washburn Water Works Company*, 182 Wis. 287, 290 et seq., 196 N.W. 537 (1923). The legislative response was the enactment of present § 196.58(5) by 1931 WIS. LAWS, C. 183. See *Milwaukee v. Public Service Commission*, 252 Wis. 358, 361-62, 31 N.W.2d 571 (1948). Subsequent decisions make it clear that the issue addressed by the Legislature was not competition, but jurisdiction over the public utility law concept of a service area. *Milwaukee v. Public Service Commission*, 268 Wis. 116, 120, 66 N.W.2d 716 (1954); *Milwaukee v. Public Service Commission*, 11 Wis.2d 111, 104 N.W.2d 167 (1960).

In originally enacting present § 66.069(2)(c), the Wisconsin Legislature did not modify its position that the PSCW, not the cities, had jurisdiction to determine service area. 1951 WIS. LAWS, C. 560, § 11, enacted sub. (2)(c) to provide: "Each village or city shall by ordinance fix the limits of such service in unincorporated areas." (Emphasis added). The explanatory note to this provision of the law when introduced (1951 Wis. Senate Bill 351) states that it was enacted "to provide a procedural omission." The Legislature did not address competition, but told municipalities the procedure by which they were to provide extra-territorial service. The PSCW continued to exercise jurisdiction over the concept of a service area. Mil-

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simply addresses the public utility concept of a service area in unincorporated towns and determines that, on this issue too, the State adopts a position of neutrality. To the extent §66.069(2)(c) can be said to be a "clear articulation and affirmative expression of any state policy," it is emphatically not a policy to displace competition. Rather, it is an expression of Wisconsin's consistent policy that municipalities, not the State, should make their own decisions in the sale of sewer services.

(2) WIS. STAT. § 144.07 does not evidence a state policy to replace competition with regulation and does not direct the City to monopolize sewer services in unincorporated areas.

The only other statute relied upon by the lower courts is WIS. STAT. §144.07(1m), (See Appendix of Statutes). This statute has no application to this case because the statute does not apply unless the Wisconsin Department of Natural Resources (WDNR) orders the City to provide service in an unincorporated area. There

(Continued from previous page)

waukee v. Public Service Commission, *supra*, 11 Wis.2d 111; see generally, Comment, *Role of Local Government In Water Law*, 1959 Wis. L. REV. 117, 121-22.

The Legislature modified the jurisdictional status by 1965 WIS. LAWS, C. 509, § 1, which amended WIS. STAT. § 66.069(2)(c) to its present wording. This enactment deprived the PSCW of jurisdiction over service questions in unincorporated areas—"Notwithstanding s. 196.58(5)." It also modified § 66.069(2)(c) from a mandatory procedural statute—"shall by ordinance fix"—to a permissive grant of jurisdiction over service area issues—a city "may by ordinance fix" the limits of its service area, with such ordinance to "delineate" the area to be served and there being "no obligation to serve beyond" the area, unless the public utility obligation to serve had previously been fixed—"existed at the time the ordinance was adopted."

is no such order here. Clearly the City is not acting pursuant to this statute because the statute has no application to the facts of this case.

Even if the WDNR had acted under §144.07(1m), the statute does not contemplate the elimination of a competitor from the marketplace. The statute reflects the policy of the State of Wisconsin that it will not *compel* a city to serve unincorporated areas. This is in accordance with §66.069(2)(c), which leaves such questions to the local governing bodies. But the statute does not express any policy of the Wisconsin Legislature as to whether the City — acting on its own — may choose to sell services to certain persons in an unincorporated area, but not to a potential competitor of the City for other sales of sewage services. It simply does not address the question of whether, under what circumstances, or according to what criteria, a city acting of its own initiative may otherwise sell or not sell sewage services beyond its corporate limits. It thus further expresses the State's neutrality as to the competitive concerns at issue.

The Wisconsin statutory scheme firmly establishes that it was the City and the City alone which decided to offer its treatment services in the Towns, but not to the Towns. The City of Eau Claire, not the State of Wisconsin, decided to monopolize sewage collection and transportation services in the Towns. The City's actions do not necessarily follow from any expressed State policy. Therefore, the *Parker* exemption does not apply.

IV. If The First Prong Of The Parker Exemption Is Adopted As Set Forth In This Brief, Active State Supervision Is Not Required In All Cases. If The Seventh Circuit's Test Is Accepted, State Supervision Must Exist In All Cases.

The second prong of the *Parker* exemption requires that the policy to displace competition be "actively supervised" by the state. *Midcal*, 445 U.S. at 105. This is required to prevent a State from thwarting the Sherman Act "by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. The purpose of the second prong of the *Parker* exemption is the same as the first — to assure that the anticompetitive conduct is the State's and not someone else's. Therefore the question of whether active State supervision is necessary depends in part upon what the requirements of the first prong of the *Parker* exemption are determined to be.²³

If the "clearly articulated and affirmatively expressed" prong of the *Parker* exemption is applied as set forth in this brief, the need for active State supervision is greatly reduced. More importantly, the issue of the second prong of the exemption is not reached because the City has failed to meet the first prong of the test for exemption.

²³The Supreme Court expressly reserved decision on this issue in *City of Boulder, supra*, 455 U.S. 51, fn. 14. The position adopted by the Seventh Circuit was without support in existing case law at the time, and is contrary to that of the First Circuit, the only Court considering the issue prior to *Hallie, Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981). Since *Hallie*, two circuits have adopted the Seventh Circuit's rule. *Gold Cross Ambulance & Tran. v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *petition for cert. filed*, 52 U.S. L.W. 3039 (Aug. 9, 1983); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984). The case relied upon by the Seventh Circuit, *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), *cert. den.*, — U.S. —, 103 S.Ct. 762 (1983), does not discuss the "active supervision" test.

If this Court requires a clearly articulated and affirmatively expressed State policy to displace competition, with the State directing or authorizing the non-sovereign to engage in anticompetitive conduct which necessarily follows from the State's policy, then active state supervision may not be required in all cases. The need for active state supervision will depend upon the nature of the anticompetitive activity. For example, in *Midcal*, the nonsovereigns were setting prices. Active State supervision was required to assure that the prices set were attributable to the State and not the nonsovereigns. Active State supervision would only be necessary in cases where it is required to assure the ultimate policymaker is the State and not the nonsovereign entity or entities. This rule would apply equally to private and public nonsovereigns.

If, however, the relaxed standard of the Seventh Circuit is utilized, the "active state supervision" test must be applied in all cases to assure the State as sovereign has made a decision to displace competition. By authorizing a municipality to act in an area, but leaving to local governments the decisionmaking authority as to *if*, when, how, under what circumstances or with what effects the authority is to be exercised, a State would satisfy the Seventh Circuit test—but leave the ultimate question of antitrust violations solely in the hands of local policymakers.

Under the Court of Appeals' test in *Hallie*, a State need only say, "Our municipalities may, if they wish, violate the Sherman Act in providing service X." If this satisfies the first prong of the *Parker* exemption, active State supervision must be required in all cases because

it would be the only real nexus between the State and the City's anticompetitive conduct.

The rationales offered for total elimination of the second prong of the test are unconvincing. First, the Court of Appeals argues:

Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed *restraints* imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist. [J.A. 41-42 (Emphasis added, footnote omitted).]

This argument proves too much. It applies with equal force to *private* parties who must establish both the "clearly articulated" and "active supervision" tests to obtain *Parker* immunity.²⁴ Second, the *Hallie* court suggests application of *Midcal* would be "unwise" because:

A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. [J.A. 42]

The very purpose of the *Parker* test, particularly as explained in *Boulder*, is to ascertain that the decision to displace competition is not one of "local autonomy" but of the State as sovereign. Finally, the Court argues,

²⁴The Court of Appeals fails to identify the "restraints" imposed by Wisconsin in allowing the City to decide if it will monopolize.

States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness. We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability. [J.A. 42-43]

Such concerns are more theoretical than real; the concerns dissipate if the *Midcal* test is applied as suggested by the Towns.²⁵

Adoption of such a requirement would not interfere with local government's traditional exercise of powers. It is only when the local body acts contrary to the antitrust law that a court need examine whether the State adequately supervised the activity. After all, local government is subject to the restraints of the Sherman Act. It is only when local government is carrying out the State's program that they are exempt. Requiring that the State supervise its own anticompetitive program is not an onerous requirement.

²⁵A final rationale, offered by the Eighth Circuit, does not withstand minimum scrutiny. The Eighth Circuit suggests that active supervision is unnecessary because municipal officials are elected. *Gold Cross*, *supra* note 23, 705 F.2d at 1014. Why the electors of a city—presumably the recipients of the economic benefits of antitrust violations by the city—would respond by voting out of office the engineers of those economic benefits is unexplained by the *Gold Cross* court. Compare *Century Federal v. City of Palo Alto, Cal.*, 579 F. Supp. 1553, 1559-60 (N.D. Cal. 1984).

V. The City's Actions Are Not Actively Supervised By The State Of Wisconsin.

If the "active state supervision" requirement is applied to the City, it is clear that Wisconsin takes no role in the City's actions. It is the decision of the City of Eau Claire to extend service to some but deny service to the Towns. Wisconsin does not review the City's decision, does not establish standards for the City to follow, does not intimate whether it agrees or disagrees with the local anticompetitive policy.

CONCLUSION

The judgment of the District Court and the Court of Appeals should be reversed and the case remanded to allow the Towns to prove their allegations.

Respectfully submitted this 26th day of July, 1984.

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APPENDIX OF STATUTES

15 U.S.C. Section 2

Sherman Act, § 2

§ 2 Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

WIS. STAT. § 66.069(2) (c) (1981)

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

WIS. STAT. § 66.076(1) (1981)

In addition to all other methods provided by law any municipality may construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the collection, transportation, storage, treatment, and disposal of sewage, including the lateral, main and intercepting sewers necessary in connection therewith, and any town, village or city may arrange for such service to be furnished by a metropolitan sewerage district or joint sewerage system. . . .

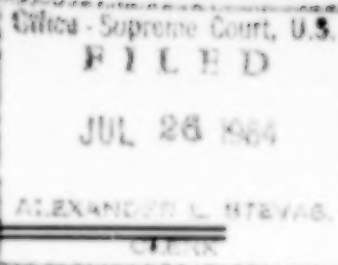
WIS. STAT. §144.07(1m) (1981)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

WIS. STAT. §196.58(5) (1981)

The commission shall have original and concurrent jurisdiction with municipalities to require extensions of service and to regulate service of public utilities. Nothing in this section shall be construed as limiting the power of the commission to act on its own motion to require extensions of service and to regulate the service of public utilities.

3158
No. 82-1832



**In The
Supreme Court of the United States**
October Term, 1984

— o —
TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION AND TOWN OF WASHINGTON,
Petitioners,

v.

CITY OF EAU CLAIRE,
Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

— o —
JOINT APPENDIX
— o —

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**PETITION FOR CERTIORARI FILED May 11, 1983
CERTIORARI GRANTED JUNE 11, 1984**

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DOCKET ENTRIES

<u>DATE</u>	<u>ENTRY</u>
October 6, 1980	Complaint filed.
November 11, 1980	Motion to Dismiss and Motion For More Definite Statement Filed.
April 5, 1982	Decision and Order of District Court granting Defendant's Motion to Dismiss.
April 5, 1982	Judgment entered.
April 22, 1982	Notice of Appeal filed.
April 28, 1982	Order Amending Order of District Court of April 5, 1982.
February 17, 1983	Decision of Circuit Court of Appeals.
May 11, 1983	Petition for Certiorari filed.
June 11, 1984	Certiorari granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 80-C-527

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION, and TOWN OF WASHINGTON,
Wisconsin Townships,

Plaintiffs,

v.

CITY OF EAU CLAIRE, a Wisconsin
Municipal Corporation,

Defendant.

COMPLAINT

The plaintiffs Town of Hallie, Town of Seymour, Town of Union and Town of Washington, by their attorneys, Claude J. Covelli and Michael P. May, hereby allege:

1. The plaintiffs Town of Hallie, Town of Seymour, Town of Union and Town of Washington (the Towns) are Wisconsin townships. The Town of Hallie is located in Chippewa County. The Towns of Seymour, Union and Washington are located in Eau Claire County.

2. The defendant City of Eau Claire (City) is a Wisconsin city located in Eau Claire and Chippewa Counties.

3. The area comprising the Towns is adjacent to the area comprising the City, as shown in the map attached hereto as Exhibit A.

4. The sewage treatment industry is comprised generally of three functional levels: collection of sewage, transportation of sewage and the treatment of sewage.

The collection of sewage encompasses the network of sewerage necessary to collect sewage from users located in the collection area and to develop and administer an appropriate user charge system. The transportation of sewage encompasses the sewerage necessary to carry the sewage from the collection system or systems to the treatment facility. The treatment of sewage encompasses the receipt of raw or pretreated sewage, the processing of such sewage and the disposal or discharge of the treated residues.

5. The City now is and at all times material hereto was the only entity within Eau Claire and portions of Chippewa Counties, or otherwise within the market available to the Towns, engaged in the business of providing sewage treatment services, and therefore dominates, controls and enjoys a monopoly over the sale and provision of sewage treatment services in Eau Claire and portions of Chippewa Counties or otherwise within the market available to the Towns for sewage treatment services.

6. The Towns are competitors or potential competitors with the City for the sale and provision of sewage collection and transportation services within the geographic market area comprising the Towns and within the geographic market area in which the City has a monopoly over the sale and provision of sewage treatment services.

7. The sale and provision of sewage collection, transportation and treatment services constitutes or has a substantial effect upon trade or commerce among the several states.

8. The Towns and the City are persons within the meaning of the Sherman Antitrust Act, 15 U.S.C. §1 *et seq.*

9. That the acts of the City complained of herein are of a continuing and ongoing nature, beginning in the early 1970's, continuing up to and including the present time and into the future.

10. That the jurisdiction of this court is founded upon 28 U.S.C. §1337 and 15 U.S.C. §15 for Claims I - IV; jurisdiction of Claim V is founded upon 28 U.S.C. §1331; and jurisdiction of Claim VI is founded upon the Court's pendent jurisdiction.

11. That the City obtained its monopoly over sewage treatment services through the development and implementation, in conjunction with the Towns, of a program under the Federal Water Pollution Control Act. The development and implementation of this program included the use of federal tax funds.

12. Under the Federal Water Pollution Control Act, a certain area is designated as a service area within which sewage treatment services are to be provided. The area so designated for the treatment services presently provided by the City is indicated in the map attached hereto as Exhibit A, and includes parts of the areas comprising the Towns (the Eau Claire Service Area).

13. That in obtaining federal tax funds to construct a sewage treatment service facility, the municipalities within a service area designate one municipality as "applicant" for the sewage treatment service facility. The remaining municipalities are designated "participants." In the case of the sewage treatment service facility for the Eau Claire Service Area, the City was designated as the applicant and the Towns as participants.

14. That following the City's acquisition of the sewage treatment service facility for the Eau Claire Service Area, the City has refused to supply sewage treatment services to the Towns. The City has provided such services to individual land owners in the Towns if and only if such land owners agree that the City will also provide the land owner with sewage collection and transportation services by requiring the annexation of the land owner's land to the City, thereby permanently eliminating competition for sewage collection and transportation services in the geographic market served by the City.

CLAIM I—Illegal Monopoly and Attempt to Monopolize

15. That the City attempted to acquire and acquired its monopoly over sewage treatment services with the plan and intent of (a) tying the provision of sewage treatment services to the provision of sewage collection and transportation services; (b) refusing to provide sewage treatment services to the Towns; and (c) eliminating the Towns as competitors for sewage collection and transportation services.

16. That the Towns have been injured by the City's actions in monopolizing sewage treatment in that no other provider is available for sewage treatment and the Towns can no longer become such providers.

CLAIM II—Tying Provision of Sewage Treatment Services to Provision of Collection and Transportation Services

17. Reallege paragraphs 1 - 14.

18. That the City has refused to provide sewage treatment services without also providing sewage collection and transportation services in the Eau Claire Service Area.

19. That the City's conduct has injured the Towns by preventing the Towns from competing with the City for the provision of sewage collection and transportation services.

CLAIM III—Refusal to Deal

20. Reallege paragraphs 1 - 14.

21. That the City has refused to provide treatment services to the Towns.

22. The City's refusal to deal has injured the Towns in that, without treatment services available, the Towns cannot enter the sewage collection and transportation market.

CLAIM IV—Prevention of Competition

23. Reallege paragraphs 1 - 14.

24. That the City has engaged in a course of conduct designed to prevent the Towns from entering the market as a competitor with the City for the provision of sewage collection and sewage transportation services.

25. That the Towns have been injured by the City's conduct in that the Towns have been unable to effectively enter the market for sewage collection and transportation.

CLAIM V—Duty to Provide Service Under Federal Act

26. Reallege paragraphs 1 - 14.

27. That the City acquired its monopoly over sewage treatment services through the use of federal tax funds under the Federal Water Pollution Control Act.

28. That pursuant to the Federal Act, the City is required to provide sewage treatment services to the Towns on a reasonable and just basis.³

29. The City is not providing sewage treatment services to the Towns on a reasonable and just basis.

30. Damages to the Towns due to the City's actions exceed \$10,000.

CLAIM VI—Duty to Serve As Public Utility

31. Reallege paragraphs 1 - 14.

32. That the City acquired its monopoly over sewage treatment services under an arrangement with the Towns where the City is required to provide treatment services to the Towns in the nature of a public utility on a reasonable and just basis.

33. That the City is not providing services to the Towns on a reasonable and just basis.

WHEREFORE, the plaintiffs pray for a judgment:

- (a) Requiring the City to provide sewage treatment services to the Towns on a reasonable and just basis;
- (b) Enjoining the City from tying, refusing to deal, or otherwise restricting the Towns' ability to compete with the City for the provision of sewage collection and transportation services;

(c) For its costs and disbursements as provided by law.

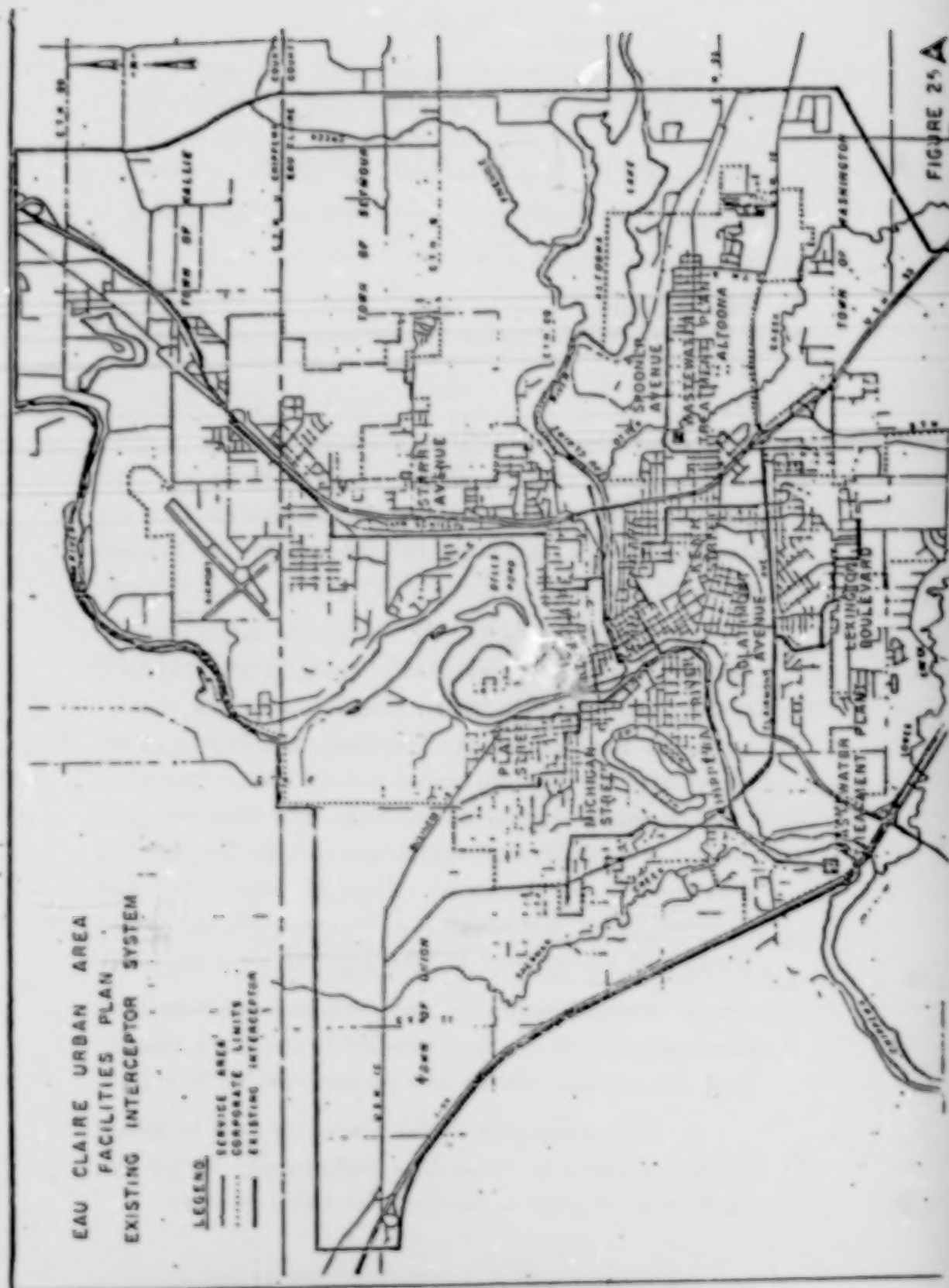
Dated this 6th day of October, 1980.

/s/ Claude J. Covelli
/s/ Michael P. May
Attorneys for Plaintiffs

OF COUNSEL:

BOARDMAN, SUHR, CURRY & FIELD
First Wisconsin Plaza, Suite 410
1 South Pinckney
P. O. Box 927
Madison, WI. 53701
(608) 257-9521

DEMAND IS HEREBY MADE FOR JURY TRIAL.



UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Caption Is Omitted In Printing]

MOTION TO DISMISS AND MOTION FOR MORE
DEFINITE STATEMENT

The defendant City of Eau Claire, by its attorney,
Frederick W. Fischer, hereby moves the court as follows:

I

To dismiss the complaint in the above-entitled action,
pursuant to Rule 12 (B) of the Federal Rules of Civil
Procedure, on the ground that the complaint fails to state
a claim upon which relief can be granted, for the follow-
ing reasons:

1. The defendant, as a Wisconsin municipal cor-
poration, owns and operates a wastewater treatment
system, including facilities for the collection, trans-
portation and treatment of sewage, which is a basic,
essential governmental utility service that is provided
only to the residents of the city, and that the pro-
viding of such governmental services in the manner
described is contemplated, intended, authorized and
directed under Wisconsin law, and, as such, is exempt
from, and not subject to, the federal antitrust laws.

2. No allegation is made in the complaint that
the town boards of the plaintiff towns have author-
ized the commencement of this action.

3. The complaint of the plaintiffs fails to allege
sufficient facts to show that the activity of the de-
fendant is subject to the federal antitrust laws.

4. The complaint of the plaintiffs fails to allege
facts showing that the activity of the defendant di-
rectly affects interstate commerce or has a substan-
tial effect on interstate commerce.

5. The failure of the complaint to allege facts
sufficient to show that the plaintiff towns, or any of
them, have demanded or requested that the defendant
provide the utility service in question to or within any
such town or towns.

II

The defendant further moves the Court to dismiss
Claim V of the complaint in the above-entitled action, pur-
suant to Rule 12 (B) of the Federal Rules of Civil Proce-
dure, on the ground that the Court lacks jurisdiction over
the subject matter, for the following reasons:

1. The amount actually in controversy is less
than \$10,000, exclusive of interest and costs, as ap-
pears on the face of the complaint. The jurisdictional
amount inserted in the complaint is fictional only, and
not claimed in good faith.

2. The several plaintiffs have improperly aggre-
gated their claims to total the minimum amount in
controversy required by the statute, such claims being
separate and distinct even though based upon the
same alleged proximate cause, as shown by the com-
plaint on file herein.

• • •

[Remainder omitted in printing.]

• • •

Dated October 30, 1980

/s/ Frederick W. Fischer
 City Attorney
 City of Eau Claire
 City Hall
 203 South Farwell Street
 Eau Claire, Wisconsin 54701
 Phone (715) 839-4907

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WISCONSIN

80-C-527

TOWN OF HALLIE, TOWN OF SEYMOUR,
 TOWN OF UNION and TOWN OF WASHINGTON,

Plaintiffs,

v.

CITY OF EAU CLAIRE,

Defendant.

DECISION AND ORDER

(Filed April 5, 1982)

Plaintiffs Town of Hallie, Town of Seymour, Town of Union and Town of Washington [Towns] filed this action against defendant City of Eau Claire [City]. The Towns are located directly adjacent to the City. They charge the City with illegally exploiting its monopoly power in sewage treatment to extract profits in sewage collection and transportation. The Towns also assert a claim under the Federal Water Pollution Control Act, as well as a pendent state claim.

The City has filed a motion to dismiss. The motion is granted.

FACTS

For the purposes of this motion, the following allegations in the complaint are accepted as true:

1. Sewage treatment is a three-step process. First, the sewage must be collected from the "user," presumably a residence or business. Next, the sewage must be trans-

ported to a treatment facility. Finally, the raw sewage must be treated and disposed of by the treatment facility.

2. The City is the only entity in the market available to the Towns that has a sewage treatment center. As a result, the City enjoys a monopoly in the market for sewage treatment services.

3. The Towns are potential competitors of the City for the sale of sewage collection and transportation services in the same market.

4. The sale of sewage collection, transportation and treatment services has a substantial impact on interstate commerce.

5. The City used federal funds to construct its sewage treatment service facility.

6. The City has refused to supply sewage treatment services to the Towns. The City has provided such services to individual land owners in the Towns if and only if the owners agree that the City will also provide sewage collection and transportation services by requiring annexation of the owner's land to the City.

OPINION

Counts One Through Four

These counts arise under the Sherman Anti-Trust Act, 15 U.S.C. §1, *et seq.* In Count One, plaintiffs allege

that the City attempted to, and did, acquire a monopoly in sewage treatment services. Count Two alleges that the City has "tied" the provision of sewage treatment services to the provision of collection and transportation services. Count Three alleges an illegal refusal to deal with the Towns. Count Four alleges that the City's conduct has prevented the competition in the market for sewage collection and transportation services.

Defendant has filed a motion to dismiss these counts, asserting several justifications. The Court will address only one of these. The Court agrees that defendant's actions as alleged in the complaint are exempt from the federal antitrust laws. Thus, these counts must be dismissed.

Parker v. Brown, 317 U.S. 341 (1943), first defined the exemption applicable to the City's conduct. *Parker* held that a state agricultural proration program was not within the intended scope of the Sherman Act:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

Id. at 350-51.

In January, the Supreme Court further explained the *Parker* doctrine (that state action is not subject to the Sherman Act) in *Community Communications Company v. City of Boulder*, 50 U.S.L.W. 4144 (January 12, 1982). The City of Boulder had granted a twenty year permit to conduct a cable television business. Plaintiff was assigned the permit in 1966. Plaintiff wished to take advantage of new technology, and, in May, 1979, informed the City Council that it planned to expand its business. Another

cable company expressed interest in providing a competing cable television service in Boulder. Boulder responded by enacting an "emergency" ordinance, prohibiting plaintiff from expanding its business for three months. Plaintiff filed suit, claiming a violation of §1 of the Sherman Act. Boulder argued that it was immune from antitrust violations because of the *Parker* doctrine. The Supreme Court disagreed. *Id.* at 4144-4145.

Justice Brennan, writing for the Court, summarized the appropriate legal test for Sherman Act exemption for a municipality:

Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, [cite omitted], or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, [cites omitted].

Id. at 4146-47.

Justice Brennan first disposed of the argument that Colorado's Home Rule Amendment is a direct delegation of state power to the municipality, thereby immunizing it from antitrust liability under the *Parker* doctrine. "Ours is a 'dual system of government,' *Parker, Supra*, at 351 (emphasis added), which has no place for sovereign cities."

Then, Justice Brennan rejected Boulder's argument that the Colorado Home Rule Amendment's "guarantee of local autonomy" constitutes a "clearly articulated and affirmatively expressed state policy" that justifies the Boulder ordinance.

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the

State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.

• • •

Acceptance of *such* a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 4147-48.

Because Boulder failed to establish that Home Rule powers alone establish that its ordinance furthered or implemented a clearly articulated and affirmatively expressed state policy, the Court did not address the second requirement for exemption from the Sherman Act by municipalities—that the state actively supervise the city's action. *Id.* at 4146, n. 14.

The second requirement was most recently articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). In *Midcal*, an anticompetitive state program for resale price maintenance of wine met the first criteria of the *Parker* doctrine—the state "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. *Id.* at 105.

The state program failed, however, to meet the second requirement for exemption from Sherman Act coverage—that the policy is actively supervised by the state. In this case, the

State simply authorized price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any “pointed reexamination” of the program. (Footnote omitted). The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .” 317 U.S., at 351.

Id. at 105-106.

The first issue before the Court, then, is whether the City’s decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. The Court holds that it does.

The City correctly identifies a number of statutes which together indicate state sanction and approval of the City’s allegedly anticompetitive policy. Individually, the statutes are sufficient. But, viewed together, the statutes justify this assessment by the Wisconsin Supreme Court in a case brought under state antitrust law:

[I]t seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a

reasonable quid pro quo that a city could require before extending sewer services to the area.

Town of Hallie v. City of Chippewa Falls, 314 N.W.2d 321, 325 (Wis. 1982).¹

First, the legislature provided that the city may fix the limits of municipal services and that the city shall have no obligation to serve areas outside the city.

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wis. Stat. §66.069 2) (c). A separate section specifically provided that §66.069 shall apply to management of a sewage system, Wis. Stat. §66.076(8). Furthermore, as the City points out, Wis. Stat. §62.18(1) grants cities the right to build sewers and limit the areas served.

More significant is Wis. Stat. §144.07. In subsection (1m), the legislature provided that the Wisconsin Department of Natural Resources (DNR) may order a city to connect its sewers to unincorporated areas surrounding the city. If the DNR so orders, the city may annex the unincorporated territory, subject to a referendum by the residents of the territory to be annexed. If the residents

¹ This Court does not rely upon the *Town of Hallie* opinion in this case, which arises under federal antitrust law and presents issues of federalism not present in the state case.

of the territory refused to become annexed, the city has no obligation to provide sewer services. This is a clear manifestation of a state policy that a municipality may condition the provision of sewer services on annexation.

The next issue is whether this policy is actively supervised by the state. The Court is satisfied that Wisconsin statutes provide sufficient supervision of the challenged practice to satisfy this requirement.

First, Wis. Stat. §144.04 requires each city proposing a sewer extension submit a plan to DNR. The city may not extend its sewers without DNR approval. Additionally, DNR may order construction of a municipal sewer system. Wis. Stat. §144.025(2)(r). Furthermore, DNR may order a city to extend its sewer services extraterritorially, under limited circumstances. Wis. Stat. §144.07(1).

In addition, Wisconsin has direct supervision over annexations. Before any city may annex, it must consider state advice as to whether annexation is against the public interest. Wis. Stat. §66.021. See also Wis. Stat. §66.021 (11)(c)1, requiring the state to consider which government entity could best supply the area to be annexed with governmental services. Finally, Wisconsin courts may invalidate an annexation if the annexation does not meet a rule of reason. See *Town of Pleasant Prairie v. City of Kenosha*, 75 Wis.2d 322, 249 N.W.2d 581 (1977).

Because the City's conduct furthers a clearly articulated and affirmatively expressed state policy, and because the state actively supervises annexation, the City enjoys *Parker* immunity from the Sherman Act. Therefore, these counts must be dismissed.

Count Five

In a separate count, plaintiffs assert that defendant City received federal funds under the Federal Water Pollution Control Act [FWPCA], that the City is required by FWPCA to provide sewage treatment to Towns on a reasonable and just basis, and that the City is not providing these services on such a basis. Defendant has also moved to dismiss this count. The motion is granted.

After a review of FWPCA, 33 U.S.C. §1281 *et seq.*, the Court cannot find justification for this claim. First, the Towns have not cited, nor is the Court aware of, a provision in the FWPCA authorizing such a suit by "participants" against an uncooperative "applicant."

Furthermore, the Court doubts that this count is ripe for trial. The entire FWPCA contemplates management and implementation by the Environmental Protection Agency [EPA]. 33 U.S.C. §1281. The Towns have not indicated whether they have pursued their remedy with EPA before seeking the review by this Court.

Finally, the Court can find no mandate to provide services to the Town in 33 U.S.C. §1284(b)(1), cited by the Towns.

Count Six

The Towns also assert that the City has a duty to provide sewage treatment to the Towns because the sewage treatment facility has "the nature of a public utility." This is a claim arising under state law. Because all federal claims have been dismissed, Count Six must be dis-

missed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1955).

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

Entered this 26th day of March, 1982.

BY THE COURT:

/s/ John C. Shabaz
District Judge

**JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN**

Civil Action File No. 80-C-527

TOWN OF HALLIE, et al.,

Plaintiffs,

v.

CITY OF EAU CLAIRE,

Defendant.

JUDGMENT

(Filed April 5, 1982)

This action came on for consideration before the Court, Honorable John Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's motion to dismiss is granted with costs.

Dated at Madison, Wisconsin, this 5th day of April, 1982.

/s/ Joseph W. Skupniewitz
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 80-C-527

[Caption Omitted In Printing]

NOTICE OF APPEAL

(Filed April 22, 1982)

Notice is hereby given that the Town of Hallie, Town of Seymour, Town of Union and Town of Washington, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 5th day of April, 1982.

Dated this 22nd day of April, 1982.

/s/ Claude J. Covelli
Attorney for Plaintiffs,
Town of Hallie, Town of
Seymour, Town of Union and
Town of Washington

OF COUNSEL:

Boardman, Suhr, Curry & Field
1 South Pinckney Street,
Suite 410
P. O. Box 927
Madison, Wisconsin 53701
608/257-9521

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

80-C-527

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF
UNION and TOWN OF WASHINGTON,

Plaintiff,

v.

CITY OF EAU CLAIRE,

Defendant.

ORDER

(Filed April 23, 1982)

The order entered in this case on April 5, 1982 is
HEREBY AMENDED in this respect:

On page 5, in the last line, "are" should be "may be."

In all other respects, the decision stands as written.

Entered this 22nd day of April, 1982.

BY THE COURT:

/s/ John C. Shabaz
District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-1715

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF
UNION AND TOWN OF WASHINGTON, WISCONSIN
TOWNSHIPS,

Plaintiffs-Appellants,

v.

CITY OF EAU CLAIRE, A WISCONSIN MUNICIPAL
CORPORATION,

Defendant-Appellee.

On Appeal From The United States District Court for the
Western District of Wisconsin.
No. 80 C 527—John C. Shabaz, *Judge.*

ARGUED OCTOBER 29, 1982—
DECIDED FEBRUARY 17, 1983

Before Eshbach, *Circuit Judge*, Coffey, *Circuit Judge*,
and Wisdom, *Senior Circuit Judge*.*

* Honorable John Minor Wisdom, Senior Circuit Judge for
the United States Court of Appeals for the Fifth Circuit sitting
by designation.

Wisdom, *Senior Circuit Judge*. Four towns allege
that a city is using a monopoly over sewage treatment serv-
ices in the relevant geographic market to gain a monopoly
in the markets for sewage collection and sewage transpor-
tation in violation of the Sherman Act, 15 U.S.C. § 1 (1973),
the Federal Water Pollution Control Act, 33 U.S.C. § 1251
(1978), and a state common law duty of a utility to serve.
On appeal, the towns contend that the district court erred
in dismissing their claims under the Sherman Act on the
ground that the conduct in question falls within the state
action immunity doctrine of *Parker v. Brown*, 317 U.S. 341
63 S.Ct. 307, 87 L.Ed.2d 315 (1943). We conclude that the
conduct in question is exempt from the antitrust laws un-
der *Parker* and *Community Communications Company v.*
City of Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810
(1982), and we affirm the district court's decision.

I

The plaintiffs-appellants—Town of Hallie, Town of
Seymour, Town of Union, and Town of Washington
("Towns")—are four Wisconsin townships that are adja-
cent to the City of Eau Claire ("City"). The City used
federal funds to build a sewage treatment facility within
the city limits, and this sewage treatment facility is the
only such facility in the market available to the Towns.
As a result, the City enjoys a monopoly in the market for
sewage treatment services.¹

¹ The disposal of sewage is a three-step process. Sewage must
be collected from the user, transported to the treatment facility,
and treated and disposed of by the treatment facility. The
City's monopoly in this case extends only to the third step.

The City has refused to supply sewage treatment services to the Towns. The district court found that the City has provided sewage treatment services to individual landowners in the Towns only if they will agree to become annexed by the City and thereby obtain sewage collection and transportation services from the City. *Town of Hallie v. City of Eau Claire*, No. 80-C-527, slip op. at 1 (W.D. Wis. April 5, 1982). By refusing to provide treatment services to the Towns, the City has prevented the Towns from competing in the markets for sewage collection and transportation. The Towns simply have no means of disposing of the sewage once they collect and transport it, so they do not collect it at all.

In their complaint seeking injunctive relief, the Towns alleged that the City's denial of sewage treatment services to them violated the Sherman Act, the Federal Water Pollution Control Act, and a common law duty of a utility to serve. The City moved to dismiss the complaint pursuant to Fed.R.Civ.Pro. 12(b), and the district court granted the motion. The district court dismissed the antitrust claims on the grounds that the City's conduct was exempt from the Sherman Act under *Parker v. Brown*.² The district court dismissed the Federal Water Pollution Control Act claim, holding that the Act does not provide a right to sue, that the Towns failed to pursue administrative remedies, and

² The Towns brought their antitrust claims under a number of theories. The first claim was that the City used its monopoly over sewage treatment to gain a monopoly over sewage collection and transportation. The second claim was that requiring the consumer to obtain sewage and collection services in order to gain sewage treatment services constituted an illegal tying arrangement. The third claim was that the City's conduct was an illegal refusal to deal with the Towns.

that the Act does not mandate the action that the Towns seek. After dismissing the federal claims, the district court dismissed the pendent state claim.

On appeal, the Towns contest only the denial of their antitrust claims. The Towns contend that the City's conduct is exempt from the Sherman Act only if it is in furtherance of clearly articulated and affirmatively expressed state policy and it is actively supervised by the State of Wisconsin. The Towns contend that state action immunity is unavailable to the City because it has met neither of these two requirements. The City contends that its denial of services to the Towns is authorized by clearly articulated state policy and that state action immunity protects its conduct.

II

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court addressed the issue whether the federal antitrust laws prohibited the State of California from adopting a program that prevented raisin producers from freely marketing their crop in interstate commerce. The Court held that the marketing program was exempt from the antitrust laws by virtue of limitations in the Sherman Act and concepts of federalism:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-51, 63 S.Ct. at 313, 87 L.Ed. at 326.

The Supreme Court later addressed the question whether the "state action" immunity exemption of *Parker v. Brown* was available to a state's municipalities.³ In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 53 L.Ed.2d 364 (1978),⁴ a private utility company brought suit under the Sherman Act against several Louisiana cities empowered to own and operate electric utility systems and alleged that they had committed various antitrust offenses in their operation of their utility systems. A majority of the Court rejected the contention that Congress did not intend the Sherman Act to apply to local governments, and a plurality of the Court stated:

Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. Parker's limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected

³ During the period from 1943 to 1975, the Supreme Court did not address the state action immunity question. Since 1975, the Court has addressed the issue of immunity under *Parker* in seven cases. The Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the antitrust laws, such as restrictive licensing practices, state action serving as a mask for private cartels, and instances of nominal state regulation in which the state took no active role. M. Handler, *Reforming the Antitrust Laws* 59 (1982). There was also the concern that regulated industries control their regulators and that private corporations use the political process to obtain monopoly profits. See R. Posner, *Economic Analysis of Law* 405-07 (2d ed. 1977).

⁴ For a discussion of the Court's decision in *City of Lafayette*, see Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435 (1981) [hereinafter "Antitrust Immunity"].

in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-413, 98 S.Ct. at 1136, 55 L.Ed.2d at 382-83. The Court recognized, however, that the state as sovereign might sanction anticompetitive activity by the municipalities and immunize this activity from antitrust liability.⁵ The Court concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383.⁶

⁵ The Court recognized that municipal corporations are instrumentalities of the state for the convenient administration of government and that a state may choose to effect its policies through the instrumentality of its cities and towns. *City of Lafayette*, 435 U.S. at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810, 819 (1981).

⁶ The Court in *City of Lafayette* reviewed a series of opinions dealing with the *Parker* exemption. The Court discussed *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which held that the antitrust laws did not apply to a ban on attorney advertising directly imposed by the Arizona Supreme Court. The Court emphasized that the state policy at issue in *Bates* was part of a comprehensive regulatory system, was clearly articulated and affirmatively expressed as state policy, and was actively supervised by the Arizona Supreme Court. *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135, 55 L.Ed.2d at 381. The Supreme Court in later cases has focused on the language requiring a "clearly articulated and affirmatively expressed state policy" and "active state supervision" in formulating the test to determine if conduct by governmental entities falls within the *Parker* exemption. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

The Supreme Court returned to the issue of state action immunity for municipalities in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1972).⁷ The Court addressed the question whether the *Parker* immunity extended to a "home rule" municipality that was granted extensive powers in local and municipal matters by the state constitution. The Court concluded that the restraint in question, a moratorium on the expansion of cable television enacted by the City Council of Boulder,⁸ could not be exempt from antitrust scrutiny unless it constituted the action of the State of Colorado itself in its sovereign capacity or municipal action in furtherance of clearly articulated and affirmatively expressed state policy. The Court held that the guarantee of local autonomy to municipalities through the Home Rule

⁷ Between the decisions of *Lafayette* and *Boulder*, the Supreme Court addressed the issue of state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). The State of California by statute required that wine suppliers set dealer resale prices and that dealers sell at those prices. The Court held that two standards must be met if this anticompetitive conduct were to receive antitrust immunity under *Parker v. Brown*. The challenged conduct must be one clearly articulated and affirmatively expressed as a state policy, and it must be actively supervised by the state. The Court struck down the statutory resale price maintenance scheme because there was no active state supervision over the private parties that were given the power to set prices under the statute. *Id.* at 105-106, 100 S.Ct. at 943, 63 L.Ed.2d at 243.

⁸ The City had enacted a moratorium on the expansion of cable television enterprises for a period of three months to give the City Council time to draft a model cable television ordinance and to invite new businesses to enter the market. The only existing cable television company in Boulder, Community Communications, sought injunctive relief to prevent the ordinance enacting the moratorium from taking effect.

Amendment to the Colorado Constitution did not constitute the "clear articulation and affirmative expression" of state policy necessary for anticompetitive conduct to be protected under *Parker*. The Court found that the Home Rule Amendment was neutral with respect to the challenged activity and rejected the City's contention that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances.

III.

The issue before the Court is to determine if the refusal of the City of Eau Claire to provide sewage treatment facilities to the Towns falls within the protection of *Parker v. Brown* as interpreted in *City of Lafayette* and *City of Boulder*. The holdings of these cases require that municipalities act pursuant to a clearly articulated and affirmatively expressed state policy. Before determining if such a state policy exists, we must resolve two preliminary issues.

First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation. The Towns argue that the district court erred in characterizing the anticompetitive conduct which must be pursuant to state policy as "the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation." According to the Towns, the City must point to a state policy authorizing the City's use of monopoly

power over sewage treatment to gain monopolies in sewage collection and transportation.

We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384. In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization.⁹ The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing effect that results from refusing to provide these services. If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect

⁹ See *Antitrust Immunity*, 95 Harv. L. Rev. at 445-46 (1981): "The Supreme Court has found it sufficient that 'the legislature contemplated the kind of action complained of'. A policy to displace antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* (quoting *City of Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384).

that is a reasonable or foreseeable consequence of engaging in the authorized activity.¹⁰

The second preliminary issue is the contention of the Towns that the City must point to a state policy *directing* or *compelling* the challenged conduct to gain *Parker* protection. There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed. 572, 587 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600, 96 S.Ct. 3110, 3122, 49 L.Ed.2d 1141, 1155 (1976), which appeared to require state compulsion as a prerequisite for municipal immunity. We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a pro-

¹⁰ See P. Areeda, *Antitrust Law* § 212.3a, at 53-54 & n. 8 (Supp. 1982) ("The courts have recognized that state statutes need not confer authorization expressly. It would be sufficient, the Supreme Court said, that 'the legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity.").

hibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Recent Supreme Court cases support our conclusion that compulsion is not required. The Court in *City of Boulder* and *City of Lafayette* explained that a state must only authorize the municipal activity for the *Parker* exemption to apply,¹¹ and many commentators have rejected the notion that compulsion is required.¹² Obviously, if the

¹¹ The court stated in *City of Boulder*:

Moreover, judicial enforcement of Congress' will regarding the state action exemption renders a state "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivision in exercising their delegated power must obey the antitrust laws."

455 U.S. at 56-57, 102 S.Ct. at 843, 70 L.Ed.2d at 822 (citations omitted) (emphasis supplied).

In *City of Lafayette*, the Court stated:

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.

435 U.S. at 416-17, 98 S.Ct. at 1138, 55 L.Ed.2d at 385 (emphasis supplied), quoted in *City of Boulder*, 455 U.S. at 57, 102 S.Ct. at 844, 70 L.Ed.2d at 822.

¹² See P. Areeda, *Antitrust Law* § 212.5 (Supp. 1982); M. Handler, *Reforming the Antitrust Laws* 64-65 (1982); *Antitrust Immunity*, 95 Harv.L.Rev. at 445 ("Lafayette does not require that governmental acts be compelled or supervised by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws.") (emphasis supplied); Page, *Antitrust Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099, 1122 n.141 (1981).

state compels or directs a municipality to undertake anti-competitive conduct, this compulsion or direction is strong evidence of a state policy to displace the antitrust laws. We hold that the City must show only that clearly articulated and affirmatively expressed state policy authorizes the City's refusal to provide sewage treatment to the Towns to gain the state action immunity of *Parker*.

IV.

The Towns contend that the City's refusal to extend sewer services to them is not pursuant to clearly articulated and affirmatively expressed state policy. We disagree. Several statutes and court decisions interpreting those statutes give the City authority to decide where to extend sewer services and to insist on annexation as a condition to extending sewer services to the surrounding area.

Section 66.069(2) (c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area.¹³ This statute authorizes the City to

¹³ Section 66.069(2)(c) provides:

Notwithstanding § 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

We note that § 66.069(2)(c) applies to water utilities. Its provisions, however, are incorporated into the statute governing municipal sewage systems by § 66.076(8).

fix the limits of its utility service and expressly provides that the City "shall have no obligation to serve beyond the area so delineated." In addition, section 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewerage system to a town, but if that town then refused to become annexed to the city, the order becomes void and the city has no obligation to extend the sewerage system.¹⁴ This statute is evidence of a state policy to require annexation as a condition to receiving municipal services.

Our conclusion that state policy authorizes the City to refuse sewage treatment services unless the purchaser becomes annexed is strengthened by the holding of *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314

¹⁴ Section 144.07 provides:

An order by the department for the connection of unincorporated territory to a city or village system or plant shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under § 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under § 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewage service shall be extended to the territory subject to the order. If an application for an annexation referendum under § 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 90-day period, the order shall be effective.

The constitutionality of § 144.07(lm) was upheld in *City of Beloit v. Kallas*, 76 Wis.2d 61, 250 N.W.2d 342 (1977). The court held the statute balanced and accommodated two matters of state concern; providing vital services to areas surrounding cities and the growth or expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.

N.W.2d 321 (1982). The Town of Hallie brought suit against Chippewa Falls under the state antitrust laws for the refusal of Chippewa Falls to provide sewage treatment facilities to the Town of Hallie unless the Town agreed to obtain other municipal services from Chippewa Falls. When the Town did not agree, the City annexed a portion of the Town. The court relied on the broad home rule provisions under Wisconsin law and §§ 66.029(2) (c) and 144.07(lm) to hold that state antitrust law did not apply to this conduct. The court stated:

Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area. . . .

While the facts of the present case are clearly not covered by this statute because no DNR order is involved, [sec. 144.07(lm)] is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

314 N.W.2d at 325-26.

The *Town of Hallie* decision and the statutes that it interprets show that there is a clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services unless they can annex the territory that they service. The City acted pursuant to and in a manner consistent with this policy by refusing

to provide sewage treatment services to the Towns unless they agreed to become annexed and acquire the full range of sewage services. We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in a furtherance of clearly articulated and affirmatively expressed state policy.

V.

The Towns contend that the State of Wisconsin must actively supervise the anticompetitive conduct for the City to gain the protection of *Parker v. Brown*. The "active state supervision" requirement arose in *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Midcal* involved a California statutory scheme allowing private wine suppliers to establish a program of resale price control to be enforced by the state. The State of California neither established nor reviewed the prices set by these private decision makers. The Supreme Court struck down the state law because it created a private price-setting mechanism that the state did not supervise. The Court concluded, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943, 63 L.Ed.2d 243.

We do not conclude that *Midcal* requires active state supervision over the conduct in this case.¹⁵ The *Midcal* case involved private parties that were given power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy,

¹⁵ In the *City of Boulder*, the Supreme Court left open the question whether a municipality must show active state supervision over its conduct in order to receive immunity under *Parker v. Brown*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*." *City of Boulder*, 455 U.S. at 51 n.14, 102 S.Ct. at 841 n.14, 70 L.Ed.2d at 819 n.14.

In *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10 Cir. 1982), the Court did not require active state supervision for the City of Pueblo to receive *Parker v. Brown* immunity. The conduct in this case involved the City's operation of a municipal airport. The Court concluded that the key inquiry was whether the State of Colorado by affirmative legislative action granted the City an exemption from the operation of the antitrust laws by virtue of statutory language giving municipalities the authority to acquire and operate a municipal airport. Under this standard, the Court held the City's conduct to be exempt from the antitrust laws.

the activity is state action and entitled to immunity even though state supervision does not exist.¹⁶

We also conclude that requiring active state supervision over a traditional municipal function would be unwise. A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness.¹⁷ We doubt that the Court in

¹⁶ See P. Areeda, *Antitrust Law* § 212.2a, at 47 (Supp. 1982) ("Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity."); *Antitrust Immunity*, 95 Harv. L. Rev. at 445 & n.49 ("Lafayette does not require that government acts . . . be supervised by the state.") ("a few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active public supervision of private parties) to require state supervision of governmental defendants"); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L. J. 305, 340-342 ("It is questionable whether a showing of active state supervision is necessary for political subdivisions to gain *Parker* immunity, however, in spite of the seemingly unequivocal language of *California Retail Liquor*."). For an argument that the Supreme Court should abandon the active state supervision requirement completely, see Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099 (1981).

¹⁷ See *City of Boulder*, 455 U.S. at 71 n.6, 102 S.Ct. at 851 n.6, 70 L.Ed.2d at 831 n.6 (Rehnquist, J., dissenting) ("The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.")

Midcal intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability.

We hold, therefore, that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity.¹⁸ The only requirement for receiving immunity when a traditional municipal function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy. We do not question the holding of *Midcal*, but we conclude that the Court's concerns with the private price-fixing arrangement in that case are not present when local governments created by state law carry out governmental functions pursuant to clearly articulated and affirmatively expressed state policy.

VI.

Our examination of Wisconsin statutes and case law reveals that the challenged conduct is in furtherance of a

¹⁸ We reserve the question whether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive *Parker v. Brown* immunity. This reflects our belief that traditional municipal activity undertaken pursuant to clearly articulated and affirmatively expressed state policy and designed to promote public health and safety should be free from antitrust attack. When municipal activity strays from these functions, which includes the provision of basic services such as sewerage and sanitation, there is a more significant threat to free competition that may warrant active state supervision. See *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 62, 171-273 (1982).

clearly articulated and affirmatively expressed state policy. On the facts of this case, we conclude that the City must make no other showing to be entitled to immunity under *Parker v. Brown*. We hold that the district court properly dismissed the antitrust counts against the City, and we affirm the judgment of the district court.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

No. 82-1832

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CLERK

In The
Supreme Court of the United States

October Term, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION and TOWN OF WASHINGTON,
Petitioners,

vs.

CITY OF EAU CLAIRE,
Respondent,

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

The questions presented on this appeal are as follows:

Is the City's policy of refusing to provide sewer utility services to properties outside the City, adopted pursuant to state law specifically authorizing but not compelling such activity, immune from application of the antitrust laws under *Parker v. Brown*?

1. Is the policy of the City undertaken in furtherance and implementation of a clearly articulated and affirmatively expressed state policy?
2. Is active state supervision of traditional, integral municipal conduct required?

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STATEMENT OF THE CASE

The Towns of Hallie, Seymour, Union and Washington about the City of Eau Claire. They filed a complaint against the City alleging violations of the Sherman Act, a duty to serve the Towns under the Federal Water Pollution Control Act and a pendent state claim alleging a common law duty to serve as a public utility.¹

The City owns and operates a sewage treatment plant. It is the only entity in the immediate area including the Towns which operates a treatment plant. The plant was constructed with federal, city and state funds. Pursuant to state law, the City has determined to fix the limits of its sewer services. It thus refuses to provide any sewage collection, transportation or treatment services to the Towns. Instead, the City will provide sewer services to Town residents only if they agree upon the annexation of their properties to the City. Upon annexation, these residents are eligible to receive sewer services provided by the City. The Towns allege that they are prevented from rendering any sewer services to these residents. No conspiracy, contract or combination in restraint of trade was alleged. The Towns claimed that the City possessed an illegal monopoly under Section 2 of the Sherman Act (15 USC s. 2).

The City moved to dismiss the complaint under Rule 12 (b)(6), Fed. R. Civ. Pro., for a failure to state a claim upon which relief can be granted, claiming immunity under *Parker v. Brown*, 317 U.S. 341 (1943). This motion was granted by the District Court. (J.A. 23).

The Seventh Circuit Court of Appeals affirmed the District Court, concluding that the City's conduct was

¹The claims based on the Federal Water Pollution Control Act are not a part of this appeal (P. Brief 5); nor is the pendent claim pursued here.

exempt under *Parker* and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982). The court found that the City acted pursuant to a clearly articulated and affirmatively expressed state policy, applying *Parker*, *City of Boulder*, and *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The court rejected the claim of the Towns that state law must make specific reference to the use of monopoly power by the City and that the monopolistic conduct must be directed or compelled by the state. The court found that legislative contemplation and authorization of the municipal action must exist before the City may claim immunity under *Parker*. It set forth criteria to be utilized in determining the existence of legislative contemplation.

Under the court's criteria, if state law gives the City authority to limit its sewer services, and to refuse to provide sewage treatment services to the Towns, then the inference can be drawn that the state contemplated that anticompetitive effects might result from such refusal. According to the Seventh Circuit, state policy to displace the antitrust laws will be found if the anticompetitive effect is legislatively contemplated; specifically, if it is a reasonable or foreseeable consequence of engaging in the authorized activity.

The Court of Appeals, while recognizing that "active state supervision" is required for private entities², found such a requirement inapplicable to the City while performing a traditional municipal function. *Parker* immunity was therefore granted without a finding of "active state supervision".

²*California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980).

SUMMARY OF ARGUMENT

I. The Motion to Dismiss of the City was granted and upheld by the lower courts. The courts held that the City was entitled to immunity under *Parker v. Brown*. The lower courts made no finding that the City violated Section 2 of the Sherman Act. Therefore, no issue is raised on this appeal as to the illegality of the City's conduct under the federal antitrust laws.

II. Legislative contemplation of the challenged activity can be determined from the authorization given to the City to operate in a particular area. Legislative contemplation can be ascertained if the anticompetitive result is a reasonable or foreseeable result of the delegated authority. Detailed approval by the state of specific anticompetitive results is not required for immunity. The Towns' Sherman Act claims are based upon the City's determination to limit its sewer service so as to exclude them. Wisconsin state law concedely grants discretionary authority to the City to so limit its service. Municipal discretion does not defeat *Parker* immunity if sufficient authority has been conferred to the municipality to act in an anticompetitive manner. When the state has authorized the conduct in question, the state is no longer neutral. This case is thus unlike *City of Boulder*, where the state had not conferred authority to the city in the area in question.

III. If state authorization of anticompetitive activity is insufficient for immunity, the alternative is to have state compulsion. This is contrary to *City of Lafayette* and *City of Boulder*. It is also inappropriate, especially in areas involving traditional governmental functions such as the rendering of sewer service. Similarly, when performing such functions, municipalities are greatly different than private entities and should not be held to the same standards. A "necessarily follows" test has not

been adopted by this court or any courts of appeal. Such a standard should not be accepted because it is ambiguous and would force state compulsion of municipal activity, thus intruding on the sovereign state.

IV. This case is vastly different from all the other cases applying the *Parker* doctrine because no private party is affected. The dispute is solely between political subdivisions of the state. *Parker* is based upon principles of federalism and the necessity for preserving state sovereignty. The state has plenary power over its subordinate governments. The federal antitrust laws, designed to protect free enterprise and economic freedom, should not be allowed to interfere with the state's sovereign right to allocate power between its own local governments. The federal government would then be making a legislative judgment as to the "best way" to assign local powers and responsibilities.

V. Wisconsin law sanctions the limitation of utility services which is under challenge. State statutes permit a city to fix the limits of its service area and to insist upon annexation as a precondition of extending service. The state Supreme Court has said that city possession of a monopoly over sewer service is appropriate and that the legislature intended such a result. The state authority is clear and affirmative and not "neutral". Requiring the legislature to go further and mandate monopolization would drastically interfere with state delegation to its municipalities, and would impair the sovereign power of the state.

VI. Adoption of the theories of the Towns would be extremely damaging to the independent decision-making abilities of municipalities. The spectre of exposing basic municipal activities to antitrust scrutiny, not to mention the possibility of ultimate liability, accompanied by treble

damages, would have a chilling effect on municipal actions. Municipalities would be deterred in performing their essential local functions.

VII. The requirement of active state supervision over traditional municipal functions is unnecessary and unwise. It is unnecessary because the conduct is that of a public entity, subject to the inherent limitations imposed upon government. As such, the public entity differs from profit-making businesses operating in competitive markets. The requirement that a city must act pursuant to a clearly articulated and affirmatively expressed state policy should be sufficient for immunity. Active state supervision is unwise for three reasons: 1) federal courts would be burdened with the difficult decision of determining what amounts to "active" supervision; 2) states would be required to invest their valuable resources in the job of supervision, which they may not even desire; and 3) local autonomy and authority would be severely eroded.

Since the Seventh Circuit found it to be unnecessary, whether or not active state supervision exists is not an issue on this appeal.

ARGUMENT

I.

The Issue On Appeal Is Immunity From The Federal Antitrust Laws Under *Parker v. Brown*, Not Whether The City Is Liable Under Those Laws.

Although the Motion to Dismiss of the City contained several grounds, the only issue considered by the Court of Appeals was the matter of state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). The issue here is

immunity, not whether the City has in fact violated the Sherman Act. Therefore, the allegations of the Towns at this preliminary stage that the City's actions violate the Sherman Act are premature and unsubstantiated. While properly pleaded facts alleged in the complaint are to be taken as true in disposing of a Motion to Dismiss under Rule 12(b)(6), this does not mean that the allegations are correct. Further, the contention that the "illegality of such conduct is unchallenged by the City" stems from the fact that the City has yet to respond on the merits, not because of concurrence with the statement. The City does indeed challenge any allegation of illegality.

Specifically, the City disagrees with the characterization that the City forecloses competition by selling its treatment services "in the Towns, but not to the Towns". (P. Brief 10-11). The City confines the rendering of its sewer services to the city boundaries, either to present city residents or to former town residents whose property has been annexed to the City. The City at no time sells its treatment services in the Towns, as alleged, a fact which is recognized in the Towns' complaint. (Complaint, par. 14, J. A. 5).

To fully answer questions of illegality, numerous legal and factual issues must first be addressed. These questions would include whether or not the division of sewer utility services into three components is valid or whether it is fictitious and illusory, the effect of the City's activities on interstate commerce, and whether the rule of reason can or should apply. Appropriately, neither the District Court nor the Court of Appeals made any finding as to whether the complaint stated a cause of action on the matter of violation of the antitrust laws. Any such finding is reserved, in the first instance, for the determination of the District Court. See *City of Boulder* (concurring opinion). 102 S.Ct. at 845.

II.

A "Clear Articulation And Affirmative Expression Of State Policy" To Replace Competition With Monopoly Public Service May Be Shown Through Legislative Contemplation And Intent.

The District Court and Court of Appeals found that the City was entitled to immunity from antitrust liability under the "state action" exemption first enunciated under *Parker v. Brown*.³ In *Parker*, the Supreme Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350. The Court, applying principles of federalism, held:

"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

The Sherman Act was viewed as a "prohibition of individual and not state action". 317 U.S. at 352. The *Parker* exemption is predicated upon the need to protect State sovereignty. In order for exemption a state policy must exist to displace competition with regulation or monopoly public service. *City of Lafayette*. For immunity to attach, the anticompetitive conduct must be either that of the state itself, or, in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed state policy to replace competition with regulation". *City of Lafayette*; *City of Boulder*.

³While "exemption" is the common terminology, what is really meant is that the Sherman Act was not intended to apply to the state action exercised in *Parker*. See *City of Lafayette*, 435 U.S. 393 fn. 8.

The dispute here lies not with the foregoing precepts, but with the degree of specificity required to determine state policy. The argument is made that state authorization must affirmatively and specifically approve the anticompetitive effects resulting from the use of delegated power. The Seventh Circuit concluded that state authorization need not be this definitive, and that legislative contemplation of the activity was sufficient. (J. A. 34). See *City of Lafayette*, 435 U.S. at 415.

Federal and state governments exercise sovereignty when legislating within their respective spheres. The *Parker* court found "no suggestion of a purpose to restrain state action in the Act's legislative history". While implicit exceptions to the Sherman Act may not be favored, where the state has clearly, affirmatively and articulately acted, exemption follows. The question here is if state action has in fact been exercised to the required degree.

A. The Test Applied by the Court of Appeals Conforms to the Standards Enunciated in *Parker*, *City of Lafayette* and *City of Boulder*; Specific, Detailed Legislative Authorization Is Not Required for *Parker* Immunity.

The Court of Appeals, in applying *Parker*, *City of Lafayette* and *City of Boulder*, refused to adopt a requirement that the City point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation. (J. A. 33-34). Instead, the Court of Appeals found that adequate state authorization consisted of the following:

"In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the state contemplated that

anticompetitive effects might result from conduct pursuant to that authorization. (J. A. 34).

• • •

If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." (J. A. 34-35).

• • •

"We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action." (J. A. 35-36).

The standards applied by the Seventh Circuit follow and are entirely consistent with the precedents established by this Court. *City of Lafayette* rejected the notion that it is necessary to refer to a "specific, detailed legislative authorization" before asserting a *Parker* defense. 435 U.S. at 415. An adequate state mandate exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of". *City of Lafayette*, 435 U.S. at 415.

The Seventh Circuit's test, rather than approval of state "indifference", requires that the state must be found to have affirmatively authorized the questioned activity. Instead of the "antithesis" of prior immunity standards set forth by the Supreme Court, the Seventh Circuit's criterion is consistent with *Parker* in that it upholds and gives effect to sovereign state enactments which would otherwise be nullified by the antitrust laws.

Rather than establishing a new test, the Seventh Circuit faithfully applied the principles and criteria enun-

ciated in *Parker*, *City of Lafayette* and *City of Boulder*. The City does not disagree with the contention that the goal under *Parker* is to isolate anticompetitive activity which is "attributable" to the sovereign state. (P. Brief 13-14). Activity which is undertaken by the state itself or which is directed by the state is certainly "attributable" to the state, but so is an activity which is contemplated and intended by the state. The Seventh Circuit's standard fulfills such a requirement.

Undeniably, the state may delegate its sovereign authority to its municipalities permitting them to engage in activities having anticompetitive effects which, if undertaken by a private party, would be violative of the Sherman Act. *City of Lafayette* held that a state may "authorize its municipalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws". 435 U.S. at 417. This delegation must be "clearly articulated and affirmatively expressed". 435 U.S. 410. The standard of the Seventh Circuit is nonetheless challenged as not fulfilling this requirement. It allegedly permits the granting of a *Parker* exemption where the state's sovereignty would not be impaired by imposing antitrust restraints.

The Seventh Circuit's test, of course, is derived from the explicit language in *City of Lafayette*. If the legislature can be said to have "contemplated the kind of action complained of", then to subject that action to antitrust liability surely impairs the sovereignty of the state. In this case, if the Wisconsin legislature is found to have contemplated that cities may refuse to extend their sewage services extraterritorially, then imposition of antitrust sanction on this conduct impairs the power of the state. Not only is the anticompetitive activity affected, but the

legislative enactment upon which the activity is based is negated.

In the instant case, Wis. Stat. 66.069 (2)(c) authorizes the city to limit its utility service area, a fact conceded by the Towns (P. Brief 32 fn. 19). If the reasonable or foreseeable anticompetitive results of such limitation are subject to the Sherman Act, the practical effect is that the City is not entitled to limit its utility service area. The enabling statute which authorizes such limitation is thus rendered a nullity. The theory that mere legislative contemplation of an anticompetitive activity is an inadequate basis for immunity permits interference with state policy, having an immediate and direct impact on the sovereignty of the state. A requirement that state policy be expressed in more mandatory terms of direction or compulsion results in a restraint upon legitimate sovereign state action. Such a restraint is contrary to the principles of federalism forming the foundation of the *Parker* immunity doctrine.

B. The Test of the Seventh Circuit Does Not Allow State Neutrality to Immunize Local Anticompetitive Conduct.

The Towns claim that the policy of the State of Wisconsin is neutral and the Seventh Circuit's test embodies the concept of neutrality. (P. Brief 22). In *City of Boulder*, a general grant of home rule authority was found to be insufficient to confer immunity, since it was "one of mere neutrality". 102 S.Ct. at 843. The Colorado home rule constitutional provision made no mention whatever of even the general area of concern, cable television, much less the specific activity under review, the granting of a cable television construction moratorium. There was an

"absence of any regulation whatever by the State of Colorado" and therefore "no interaction of state and local regulation". 102 S.Ct. at 843. The State of Colorado had delegated no regulatory authority or expressed a policy or position, one way or the other, as to the questioned activity. The state law was simply silent on the matter. The City submits that *City of Boulder* would have presented an entirely different question, however, had the Colorado legislature enacted legislation authorizing its municipalities to impose moratoriums on cable television construction. In such a case the anticompetitive result would have been contemplated by the legislature. Antitrust immunity would have followed under *City of Lafayette*.

The test set forth by the Seventh Circuit is consistent with *City of Boulder* and the other precedents established by this Court. Under the test, neutrality is insufficient as a basis for immunity. Immunity is not conferred merely because a city "has found a way" to use delegated power anticompetitively. This is because the Seventh Circuit's test specifically requires that the anticompetitive effect be a "reasonable or foreseeable consequence of engaging in the authorized activity". Such a standard is not a new standard at all, but a further clarification of the "legislative contemplation" requirement of *City of Lafayette*. Under the standard, cities would not be permitted to simply do as they please with impunity, but would be able to claim immunity only when it is found that the anticompetitive effect is a reasonable or foreseeable consequence of state action.

Pursuing the claim of neutrality, the Towns make the remarkable statement that:

"It is just as likely that the legislature delegated the potential authority without considering the possibil-

ity that a municipality would impose a restraint of the type engaged in." (P. Brief 22).

It is extremely difficult to see how the foregoing could be true in this case, given the Wisconsin statutory delegation which affirmatively authorizes the limiting of sewer utility services. Nevertheless, if the legislature could truly be said not to have considered the possibility of restraint on competition, then the result of the municipal action would not be a "reasonable or foreseeable consequence" or "contemplated" by the legislature. Immunity would therefore be denied. The test enunciated by the Seventh Circuit would grant immunity only if it is justified pursuant to the exercise of affirmative state action.

The argument is made that the Seventh Circuit's criteria permits exemption where the state authorizes an "anticompetitive use" of delegated power. The Towns claim that a procompetitive exercise of power could be said to be equally condoned, thereby resulting in "precise neutrality". (P. Brief 22). The Seventh Circuit said this:

"If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." (Emphasis supplied.) (J. A. 34-35).

Thus, the use of power must be approved by the legislature, and the anticompetitive effect must be a reasonable or foreseeable result of the use of the power. As pointed out in *Vickery Manor Service Corporation v. Village of Mundelein*, 575 F. Supp. 996 (N.D. Ill., 1983) in a case applying *Town of Hallie*:

"Although in *Town of Hallie* the legislature had not specifically authorized the anticompetitive result which was challenged in that case, the legislature had specifically authorized municipalities to wield the anticompetitive power which caused the result." 575 F. Supp. at 1000.

If the legislature can be said to have envisioned and authorized an anticompetitive result, it certainly must have contemplated it, thus satisfying *City of Lafayette*. Since the state can then be said to have contemplated the action, the state's position is not one of "precise neutrality", as alleged. Attempts to invalidate the test of the Seventh Circuit based on *City of Boulder* are in error. The Seventh Circuit requires that the court examine all authority given by the state to the municipality, as shown by statutory and case law, in order to determine whether the state contemplated the anticompetitive effects of the exercise of the authority. This approach is reasonable and appropriate.

The overall objective is to ascertain legislative intention. The goal is not to determine that particular anticompetitive conduct is necessary to implement a state program, but whether the legislature contemplated and intended the action in question. In *City of Boulder*, state neutrality did not meet the foregoing objective, because legislative intent was nonexistent. As a result, enforcement of the federal antitrust laws did not affect any expressed legislative policy of the State of Colorado. The state's sovereignty thus remained unaffected by the application of the antitrust laws to the City's activity.

State condonation of municipal conduct is said to be equivalent to neutrality. The reference to the word "condone" by Judge Wisdom (J. A. 34) must be viewed in the context within which it is used. It is mentioned during a discussion of the meaning of the "legislative contemplation" standard of *City of Lafayette*. In context, "condones" is obviously meant to refer to the intention or contemplation by the state of anticompetitive effects of authorized municipal activity. The criteria set forth by the court comports with *City of Lafayette* and *City of Boul-*

der. It is not a test permitting antitrust immunization based upon neutral state policy. Because the state must be found to have clearly and affirmatively addressed and to have intended or contemplated the questionable activity, the test does not accept state neutrality as a standard.

The fact that the delegation of State authority may give the municipality a choice of options, some of which may be anticompetitive, does not make the state delegation "neutral". Unless the sole alternative given by the state to its cities is that "you shall act anticompetitively", the cities will possess discretionary authority. If the state decrees "you may act anticompetitively", this would undoubtedly be open to challenge according to the argument of the Towns because the City would then retain the ability to not act at all or to act in a procompetitive manner.

This position misses the point made in *City of Lafayette* and *City of Boulder*. The issue is not whether a locality is entitled to refrain from acting or to act procompetitively in exercising its power. Under a system of delegated municipal authority, such alternatives may always be available to the political subdivision, and perhaps even be said to be "contemplated" by the state. In order for a municipality to be immune under *Parker*, the essential question is whether it is empowered, pursuant to clear and affirmative state authority, to act in an anticompetitive manner. Under these circumstances, there is an "interaction of state and local regulation" and the city acts pursuant to state authority, and not solely on its own. *City of Boulder*, 102 S. Ct. at 843.

If the state says that a city may confine its services to the city boundary, why must it be required to go further and state that "the city is authorized to monopolize service in the area"? Such a mandate is not only unnecessary,

but would appear to conflict with the admonition in *Parker* and *Midcal* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful". 317 U.S. at 351; 445 U.S. at 104. Once the state has clearly and affirmatively conferred the authority to engage in anticompetitive conduct, then it has lent its active assistance to its local agent. The state has expressed its intention to displace competition. As a result, the policy of the state has been declared and the state is no longer neutral. The test applied by the Seventh Circuit accommodates both the Sherman Act and the sovereignty of the state.

C. Public Entities, Especially When Performing Traditional Governmental Functions, Should Not Be Held to the Same Standard as Private Entities.

In one sense, municipalities can be said to be naturally monopolistic, particularly in the area of providing basic, integral and traditional municipal services.⁴ Monopolization results because municipalities are seldom required to exercise such powers outside of the city boundaries. Absent legislative authorization, municipalities are not even permitted to perform such functions extra-territorially.⁵ Furthermore, merely because a municipality is allowed to extend its services outside of the munic-

⁴These are types of service "which governments are created to provide". *National League of Cities v. Usery*, 426 U.S. 833 (1976). The provision of sewer service undoubtedly fits within this category. *Usery*, 426 U.S. at 851. "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." McQuillin, *Municipal Corporations*, ss. 31.10; 31.10a.

⁵See McQuillin, *Municipal Corporations*, s. 10.07; Antieau, *Municipal Corporation Law*, ss. 5.10 and 5.11; Rhyne, *The Law of Local Government Operations*, s. 12.1.

ipal boundaries does not mean that it is required to do so. In addition to sewer service, the providing of services such as water, police, fire, street, health and refuse disposal are, in the absence of expressed statutory authority, confined to the municipal borders. Within its borders, the determination of the municipality as to how its services will be rendered is plenary, subject, of course, to control and regulation by the state legislature and its agencies.

If the decision to confine city sewer services to the city boundary is subject to antitrust scrutiny, then the territorial limitation of all manner of traditional services would be open to antitrust challenge. The denial of other traditional municipal services such as police, fire and garbage services to surrounding areas would be subject to federal antitrust law. There would be no limit as to the number of area communities which could claim an entitlement to any municipal service which they are unable to provide. The city would act at its risk in prohibiting or restricting private entrepreneurs from providing traditional services in competition with those provided by the municipality.⁶

⁶Such results are contrary to state intentions. However, because of the great latitude states historically have granted their municipalities in carrying out traditional operations, state law may confer only general authority in these areas. In this regard, see Wis. Stat. 62.11 (5):

Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby

(Continued on next page)

The performance of traditional municipal services is for the public benefit of the community as a whole, and only the community.⁷ Such a situation is plainly distinguishable from the characteristics and motivations of private interests, operating as businesses in competitive markets, whose incentive is profit. Even where a municipality engages in an acknowledged business-like proprietary function, it is different than a private corporation. Generation of revenue is incidental and subsidiary to the governmental purpose furthered by the activity.

"Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise . . . Local government exists to provide for the welfare of its people, not for a limited group of stockholders." *New York v. United States*, 326 U.S. 572 at 593 (1946), Justice Douglas, dissenting.

Local governments are readily distinguishable from private businesses in several ways. Local governments

(Continued from previous page)

conferred shall be in addition to all other grants and shall be limited only by express language.

It is ironic that municipalities in those states that have seen fit to entrust to them the greatest amount of autonomy in local affairs are most susceptible to antitrust attack, while municipalities in other states which are granted specifically delegated powers have the greatest degree of immunity.

⁷In this case, the motivation behind the sewer extension policy of the city is to prevent uncontrolled urban sprawl resulting from extraterritorial sewer extensions and to prevent peripheral urban development on the fringe of the city which stifles the city's growth. See *City of Beloit v. Kallas* (infra, p. 33, fn 19). An additional reason is that non-residents of the city who seek city services should equitably not be able to pick and choose the municipal service of their choice, but should instead become a part of the city and support its services through their taxes. See decision of Court of Appeals, quoting *Town of Hallie v. City of Chippewa Falls* (infra, p. 27, fn 11) (J.A. 39-40).

are not profit-making and cannot go out of business. The reason for their existence is to serve the public purpose and to foster and preserve the health, safety and welfare of their citizens. They may expend public funds solely for public purposes. The state legislature has ultimate control over their very existence. Local governments undertake certain functions (police, fire, and sewer), the performance of which is almost universally confined only to government. Practically every governmental decision, whether through performance of a function or by regulation, has an impact on competition, however slight.

Likewise, the impact of the Sherman Act upon public bodies is greatly different than its effect upon private businesses. The antitrust liability of a private corporation is ultimately confined to the assets of the business and is a risk which is assumed and shared by the corporate stockholders. The corporation can eventually cease its business; a city must continue to perform its public responsibilities. On the other hand, exposure to the antitrust laws may hinder and inhibit public officials, who may be concerned about potential liability, from performing their necessary functions in good faith. Further, treble damages and costs of defense which are assessed against public entities are paid not by the business investor but by the public taxpayer.

If a private entity is allowed by the state to decide whether to compete or to act anticompetitively, then there is no conflict between the federal antitrust laws and state law because the entity can comply with both federal and state law at the same time. This rationale does not apply to public entities. If a municipality is required by the Sherman Act to act competitively in an area where the state has indicated it could act anticompetitively, state legislative intent is abrogated by federal law.

For these reasons, those "state action" cases pertaining to private conduct should not be applied wholesale and without question to public defendants. One such case is *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976). *Cantor* is cited for the proposition that the state's policy must explicitly displace competition; otherwise, no federal-state conflict results. (P. Brief 18-19). The case involved the distribution of electric lightbulbs by a private electric utility. The holding in *Cantor* has been extensively limited to private entities to the point where its applicability to public parties may be in serious doubt. In the words of *Cantor* itself, it was "unlike *Parker*" because no public officials were named as parties and no claim was made that any state action violated the antitrust laws. 428 U.S. at 591.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), distinguished *Cantor* on several grounds. One was the distinction between public and private defendants. The court suggested that *Cantor* may have been decided otherwise if a public agency or official had been involved.

"First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party." 433 U.S. at 361.

Any contention that the reasoning of *Cantor* automatically applies with equal force to public entities is plainly in error. The plurality opinion in *City of Lafayette* said that *Cantor* was "not necessarily applicable" because it involved private parties. 435 U.S. at 410, fn. 40. The court further noted that "(i)t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U.S. at 417, fn. 48. The majority opinion in *City of Boulder* reiterated this point. 102 S. Ct. at 843, fn. 20.

The concurrence in *City of Boulder* noted that the plurality in *Cantor* "reviewed the *Parker* case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so." 102 S. Ct. at 844; also see fn. 2. *Parker* itself recognized that the purpose of the Sherman Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*. (Emphasis supplied.) 317 U.S. at 351.

A municipality's governmental power to deal with areas customarily reserved for it should not be preempted or displaced by general statutory policies forming an economic model of competition for businesses operating in private markets.

D. The "Necessarily Follows" Test Set Forth By The Towns Is Not The Proper Test For Immunity And Is Contrary To City of Lafayette and City of Boulder.

Having set aside the Seventh Circuit's criteria for immunity, the Towns put forth a test of their own. They suggest that *Parker* immunity should be granted only when the anticompetitive conduct "necessarily follows" from the clear and affirmative declaration of state policy. (P. Brief 27). Such a test is claimed to have application in the Ninth Circuit. However, an examination of the two cases cited for this proposition reveals that only one arguably applied the test, and even that case did not establish a new standard of immunity.

Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), uses the words in concluding that it does not "necessarily follow" that a city having a monopoly over a natural re-

source may tie the purchase of other products or services to the sale of the natural resource. The later case of *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), also cited as a source of the "necessarily follows" test, makes no reference whatever to it. It refers to *Parks v. Watson*, but only as to the necessity of having a state policy and legislative contemplation of the anticompetitive action. *Golden State Transit*, instead of establishing any new standard, proceeds to apply the well-established criteria of "legislative contemplation". Consequently, instead of a universal standard established by the Ninth Circuit, it appears that the "test" amounts to nothing more than language of interpretation utilized in a phrase in a single case.

The "necessarily follows" criterion has not been enunciated by the Supreme Court. The standard is ambiguous, being capable of two meanings. In one sense, the phrase could merely be a reformulation of the test applied by the Seventh Circuit. If "necessarily follows" is intended to mean "as a natural consequence of", then it is no different than the "reasonable or foreseeable consequence" standard of the Seventh Circuit.⁸ An examination of *Parks v. Watson* reveals that this was the meaning intended by the Ninth Circuit in an attempt to determine legislative interpretation. For instance, the court found it "untenable that the legislature contemplated" the restraint on competition. 716 F. 2d at 664. On the other hand, "necessarily follows" may mean that an anticompetitive result must be an "inevitable result" of the authorized activity. Although not clear, this is undoubtedly the

⁸As authority for its "reasonable or foreseeable consequence" standard, the Seventh Circuit cited P. Areeda *Anti-trust Law*, setting forth a "necessary consequence" standard. (J. A. 35 fn. 10).

interpretation urged by the Towns. Such a construction would impose the requirement that an anticompetitive action must be directed or compelled by the state. This position has not been adopted by this Court in cases involving the antitrust immunity of municipalities. Any such interpretation was properly rejected by the Seventh Circuit. (J. A. 35-36).

It is clear that in *Parks v. Watson*, the Ninth Circuit did not intend to establish any new test of immunity. The Ninth Circuit stated that because a state may authorize a city to be a sole supplier of a natural resource, it does not "necessarily follow" that the city is immune from antitrust liability when it ties other purchases to the sale of the resource. This statement must be read together with the entire decision, however. The decision, taken as a whole, makes it clear that what the court meant was that there was no legislative contemplation or authorization of the conduct. The court found nothing in the state law which would entitle it to "infer that any authorization" existed for the anticompetitive actions of the city. 716 F. 2d at 664. The court, quoting *City of Lafayette*, stated:

"Even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 716 F.2d at 663.

The "necessarily follows" standard is not the correct test. Of all the federal courts applying the state action exemption to a public defendant since *City of Boulder* and *City of Lafayette*, *Parks v. Watson* is the only case ostensibly using such a test. No other circuit has applied it. More importantly, the standard of the Seventh Circuit does not admit of a construction which, contrary to *City of Lafayette* and *City of Boulder*, would require state compulsion in order for immunity to attach.

The claim is made that any test other than "necessarily follows" would call for speculation as to whether the legislature contemplated the anticompetitive conduct under scrutiny. Just as the grading of bar exams was found not to be an exact science in *Hoover v. Ronwin* — U.S. —, 52 U.S.L.W. 4535 at 4541 fn. 31 (1984), thus requiring the exercise of judgment and discretion by the bar examiners, neither is the delegation of state authority to municipalities always susceptible to refined scientific analysis. Given the fact that no test will be capable of being applied with mathematical exactitude, the standard espoused by the Towns is no more precise than that of the Seventh Circuit. It is less definite and certain due to its ambiguity. Under any test, state legislative policy and intent must be determined. However, determining whether a particular municipal action was "necessary" would require the federal courts to substitute their judgment for that of the state legislature.

An impairment of state sovereignty by enforcement of the Sherman Act results not only by application of the Act to municipal conduct which "necessarily follows" from the state's policy or program. It is equally true that state sovereignty may be adversely impacted if the antitrust laws defeat municipal action which is legislatively contemplated, authorized and intended. Applying the antitrust laws to legislatively intended and contemplated conduct likewise defeats legislative intent and compromises state sovereignty.

E. No Private Entity is Affected by the City's Conduct; Only Subdivisions of the State Are Involved.

All of the Supreme Court cases applying the state action doctrine to date have involved, to some degree, the relationship of a governmental decision to a private inter-

est affected by that decision.⁹ This case is different in that the dispute is entirely between four towns and a city, all subdivisions of the state. Quality of service and consumer welfare are not considerations here. The only possible harm is to the Towns by loss of territory through annexations. Yet this is not an unexpected result since state law permits the annexation of town territory. Wis. Stat. 66.021. Applying Sherman Act principles to this dispute would not increase private competition in the marketplace, but would only serve to reorder the relative powers and authority which the state has previously conferred upon the Towns and the City.

The state is vested with plenary authority and control over its towns and cities. *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514 (1880); *Scharping v. Johnson*, 32 Wis. 2d 383, 145 NW 2d 691 (1966). The state, exercising its sovereignty in this area, is entitled to arrange and rearrange its subdivisions and to allocate and reallocate powers between them as it deems appropriate. An example of this is the Wisconsin legislative scheme governing municipal annexations. State law provides that a city may annex town territory (by direct petition of owners and electors or by petition to court), but a town may not annex city territory. Wis. Stat. 66.021. The state, since it controls all aspects of municipal existence from creation to demise, necessarily possesses the ultimate authority over the degree of competition which will be permitted between its local governments. The Sherman Act goal of "freedom of competition" in the economic arena is

⁹*Parker* (private raisin products); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Bates and Ronwin* (attorneys); *Cantor and City of Lafayette* (private electric utilities); *City of Boulder* (cable television companies); *Midcal* (wine dealers); and *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (automobile dealers).

not as applicable in such a setting, if it should be applicable at all, as it is in the private marketplace. Local governments cannot compete with each other in the same sense as private corporations, nor should the state allow them to engage in unfettered competition. Political subdivisions are allowed to compete with other political subdivisions only to the extent permitted by the state.

Anticompetitive conduct between political subdivisions of a state is far removed from the individual and corporate activities originally intended to be subject to the Sherman Act.¹⁰ The antitrust laws should not be allowed to interfere with the state's hegemony over its own subdivisions. A state should be permitted to exercise its sovereignty over its subordinate governments without disruption in the person of a federal court applying federal antitrust laws.

III.

Wisconsin Statutes And Case Law Clearly Articulate And Affirmatively Express A State Policy To Displace Competition With Monopoly Sewer Service.

The legislature of the State of Wisconsin has promulgated not one but several statutes, each of which clearly articulates and affirmatively expresses state policy in the realm of sewer utility service. Taken together, the statu-

¹⁰The statement of general principles upon which the Sherman Act is based, as set forth in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), that:

"Antitrust laws in general, and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster,"

seems strangely out of place in such a setting.

tory scheme of the state undeniably supports the city's activity. The allegation that the decision to monopolize service in unincorporated areas was made "without any guidance or direction from the state whatsoever", is patently incorrect. (P. Brief 30). The questioned activity was not undertaken by the city without authorization. Instead it was performed pursuant to explicit state law. The Wisconsin laws amply provide for and demonstrate such guidelines and directives. Contrary to the total absence of any state regulation of cable television in *City of Boulder*, by all accounts Wisconsin law contemplates that municipalities will confine their sewer utility services to the city boundaries. Furthermore, in a case not cited by the Towns, interpreting Wisconsin's "Little Sherman Act" the Wisconsin Supreme Court held that such activity, and any anticompetitive effect of the activity, was in fact intended by the legislature.¹¹

A. Wisconsin Statutes 66.076 (1) and 66.30 Are General Grants of Authority and Do Not Negate the Clear Articulation and Affirmative Expression of Other Statutes.

In an argument presented here for the first time, Wis. Stats. 66.076 (1) and 66.30 are cited in support of a contention that state policy is procompetitive and therefore neutralizes other specific statutes authorizing the City's conduct. These statutes fail to support such a proposition.

Section 66.076 (1) is a general enabling statute permitting enumerated municipalities to operate sewage systems.¹² The language of Section 66.076(1) does not

¹¹Wis. Stat. 133.01 et. seq.; *Town of Hallie v. City of Chipewa Falls*, 105 Wis. 2d 533, 314 NW 2d 321 (1982).

¹²It is interesting to note that Section 66.076 (1) and (1m) (see text set forth on p. 31 of Towns' Brief), permit any mu-
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negative the specific statutory provisions empowering the City to limit extraterritorial sewer service, a matter discussed later in this brief.¹³ In fact, Subsection (8) of Section 66.076 itself, pertaining to sewer service, incorporates all of the provisions of Section 66.069, relating to water utilities, including the authorization to limit the sewer service area. See Wis. Stat. 66.076 (8) and Wis. Stat. 66.069 (2) (c).

Section 66.30 is a statute of general application permitting municipalities to cooperate with one another on any matter where they could otherwise act individually. The authority is not confined to sewer utility service, but covers all types of municipal activities. The statute is strictly permissive. Under it, municipalities may or may not choose to enter into cooperative agreements. Simply because a municipality may decide not to cooperate with another does not mean that it is acting anticompetitively. Conversely, two or more municipalities entering into

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municipality to undertake the collection, transportation and treatment of sewage. "Municipality" includes towns. The towns thus possess the explicit authority to engage in all aspects of sewage processing, including treatment. The Towns do not explain their crucial allegation that they can only obtain treatment services from the city. If the inability of the Towns to provide treatment services is for reasons other than the City's policies, such as financial causes, then the Towns are not prevented by the City from competing with the City.

¹³Neither does the City have the degree of autonomy in rendering sewer service which is suggested by the Towns. The City concurs with the Towns that the Public Service Commission of Wisconsin (PSCW) does not have jurisdiction over the extension of sewer service. However, the Wisconsin Department of Natural Resources (DNR) does possess such jurisdiction. See Wis. Stat. 144.024 (2) (r) (DNR may order a municipality to construct an entire sewage system), Wis. Stat. 144.04 (DNR must approve plans for all sewage system extensions), and Wis. Stat. 144.07 (1) (DNR can order the planning and construction of a sewage system so that it may be connected with that of a town and may order such connection).

a cooperative agreement does not guarantee greater competition, but may actually achieve an opposite result. As an example of this, a city and a neighboring municipality could enter into a cooperative agreement to share sewage treatment to the exclusion of adjacent towns.¹⁴ The statute has absolutely no relevance to the issue before the court.

B. Wisconsin Statutes 66.069(2) (c) and 144.07 (1m) Support the Seventh Circuit's Finding of Adequate State Action.

In ascertaining legislative contemplation and authorization, the Seventh Circuit relied upon Wis. Stats. 66.069 (2) (c) and 144.07 (1m).¹⁵ These statutes constitute clearly articulated and affirmatively expressed state policy supporting the conduct of the City.

Section 66.069 (2)(c) plainly states that a city may fix the area within which to extend its sewer services. Once the area is fixed, the utility has "no obligation to serve beyond the area so delineated". By statute, then, the City may limit its sewer service area. The City is therefore authorized to engage in the precise activity which is claimed to be monopolistic and anticompetitive.

Section 144.07 (1m) is an alternative to an order of the DNR compelling the extension of sewer services to a township area. In such a case, the city may offer to annex the area subject to the order. If annexation is re-

¹⁴The end result of such an arrangement may be that the Towns would then allege a conspiracy in violation of Section 1 of the Sherman Act instead of Section 2. (15 USC s. 1).

¹⁵It could also have included, as did the District Court, Wis. Stat. 62.18 (1). This statute grants authority to cities to construct, add to, alter and repair sewerage systems. The authority includes power to "describe with reasonable particularity the district to be served". All of the statutes referred to here are contained in the appendix to this brief.

fused, the DNR order becomes void and the city is not required to extend the sewerage system.

Each of these statutes affirmatively delegates authority to the city to take the action which is under challenge here, namely, the refusal to provide sewage treatment service extraterritorially. The District Court observed that the statutes, viewed individually or collectively, are sufficient for immunity and show ample legislative contemplation of the activity in question. (J. A. 18-20). The Seventh Circuit upheld this finding. (J. A. 37-40).

No allegation is made that the legislature did not authorize, contemplate or intend the fixing of the service boundary by the City. Instead, it is claimed that the statute is permissive, and that a city "may" utilize the statute to fix limits of service, or it may not. (P. Brief 32 and 35). In an attempt to bring this case within *City of Boulder*, it is argued that the City may engage in anti-competitive activity while others may not, and that both practices are equally "contemplated" and "comprehended" by the state. Section 66.069 (2)(c), it is claimed, does not "tell the City" how to delineate the area it will serve. (P. Brief 35). This argument overlooks the declaration in *City of Lafayette* and *City of Boulder* that a state need only authorize the providing of services on a monopoly basis. As with the "necessarily follows" test, this argument fallaciously equates municipal choice and discretion with state neutrality. A state which has promulgated a statute such as Section 66.069 (2)(c) is no longer neutral, even though the statute confers discretion to exercise the authority granted. If a state authorizes a city to take action which, if taken, is anticompetitive, the state must have anticipated and contemplated such a result.

"... when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." (Emphasis supplied). *City of Boulder*, 102 S. Ct. at 843.

Also,

"*Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws." (Emphasis supplied). *City of Boulder*, 102 S. Ct. at 844.

City of Lafayette found that an adequate state mandate may be determined "from the authority given a governmental entity to operate in a particular area". (Emphasis supplied). 435 U.S. at 415.

To require Section 66.069 (2)(c) to be a directive instead of an authorization would render the foregoing references to legislative authorization meaningless. In such a case, a state would no longer be able to delegate authority to local governments to engage in conduct having potential anticompetitive effects without fear of antitrust exposure. Instead of delegation, state mandate would be required. Political subdivisions would become *de facto* state agencies. Mandated authority is the antithesis of delegated authority, which, after all, is the reason for the existence of local governments in the first place.¹⁶

¹⁶"Immunity (under the state action doctrine) for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature." P. Areeda, *Anti-trust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445 fn. 49 (1981).

In the context of this appeal, if the state is required to make all the decisions in the area of sewer service extensions, what need is there for delegated authority? Quite clearly, it is then superfluous. However, *City of Boulder* assures us that under its holding a state will be:

"No less able to allocate governmental power between itself and its political subdivisions." 102 S. Ct. at 843.

Basing immunity upon a non-mandatory statute such as Section 66.069 (2) (c), does not "wholly eviscerate the concepts of 'clear articulation and affirmative expression'".¹⁷ (P. Brief 35). The foregoing comment in *City of Boulder* was in reference to a "general grant of power to enact ordinances", by way of home rule authority. 102 S.Ct. at 843. It was not a reference to a specific grant of power to undertake a particular activity having reasonable or foreseeable anticompetitive results. To the contrary, the requirement of state compulsion would eradicate the traditional relationship which has long been established between the state and its subdivisions.

It is asserted that the purpose of Section 66.069 (2) (c) is not to displace competition. (P. Brief 35-37). Whatever the statutory purpose, the language of the statute is controlling and its effect is clear.¹⁸ The plain

¹⁷The cases of *Vickery Manor* (supra); *Campbell v. City of Chicago*, 577 F. Supp. 1166 (N.D. Ill. 1983); *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (N.D. Ill. 1984); and *Unity Ventures, et al v. County of Lake*, No. 81-C-2745 (N.D. Ill. 1984) prove that the Seventh Circuit's test does not "eviscerate" clear articulation and affirmative expression. In these cases arising in the Seventh Circuit *Parker* immunity was denied after applying the standards for immunity laid down by the Court of Appeals.

¹⁸The history of Section 66.069 (2) (c) is nevertheless illuminating. As set forth by the Towns (P. Brief 36 fn 22) this his-

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meaning of the statute is not ambiguous. Thus, speculation as to some unenunciated purpose of legislature is unnecessary.

The other statute relied upon by the Seventh Circuit is Wis. Stat. 144.07 (1m).¹⁹ As noted earlier in this brief,

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tory shows the changes and development of state policy over the years. The state initially obtained total control over sewer extensions with the adoption of Wis. Stat. 196.58 (5). This resulted in determinations of the PSCW that the rendering of utility services extraterritorially to some users within towns could result in a "holding out" of service, requiring extension to other non-city users. *City of Milwaukee v. PSC*, 252 Wis. 358, 31 NW 2d 571 (1948); *City of Milwaukee v. PSC*, 268 Wis. 116, 66 NW 2d 716 (1954). Against this backdrop, Section 66.069 (2) (c) became law. The statute 1) transferred the authority formerly vested in the PSCW to the state's cities, and 2) eliminated the potential claim that a city was "holding out" and compelled to extend service beyond its designated service area. Thus, state policy has been to transfer power over utility extensions from the state itself to its municipalities. Prior to the enactment of Section 66.069 (2) (c), if the state itself (through the PSCW under the authority of Section 196.58 (5)) had made an anticompetitive decision not to approve extraterritorial extensions of municipal utilities, this would clearly be state action and immune from the Sherman Act. The conscious delegation of this authority by the state to its municipalities should not destroy this immunity.

¹⁹The Towns do not discuss the purpose and history of Section 144.07 (1m) as they did with Section 66.069 (2) (c). These matters are fully discussed in *City of Beloit v. Kallas*, 76 Wis. 2d 61, 250 NW 2d 342 (1977) where the constitutionality of Section 144.07 (1m) was upheld. The court found that the statute was adopted by the legislature to balance two competing matters of statewide concern: 1) pollution control, and 2) urban development or expansion by annexation. These competing interests were present in the earlier case of *In Re City of Fond du Lac v. Miller*, 42 Wis. 2d 323, 166 NW 2d 225 (1969), where the court refused to permit the judiciary to resolve the conflict between the two interests, and invited the legislature to act. The underlying problem, as expressed in *In Re City of Fond du Lac*, later quoted in *City of Beloit*, was as follows:

All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with

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Section 144.07 (1) is the sole statutory authority by which the sewer utility of the city can be ordered by the state to be connected with that of an adjacent town, without the consent of the city. (See p. 28, fn. 13). When such an order is issued, Section 144.07 (1m) empowers the City to seek annexation of the town area and, if the annexation is refused, the state order is voided.

Section 144.07 (1m) is declared to be inapplicable here since no state order has been issued which activates the statute. (P. Brief 37-38). This provision, however, must be viewed as part of the comprehensive statutory scheme. The District Court noted that the statute "is a clear manifestation of a state policy that a municipality may condition the provision of sewer services on annexation". (J. A. 20). The Court of Appeals observed that "(t)his statute is evidence of a state policy to require annexation as a condition to receiving municipal services".

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population densities at or near the normal city level. Even though these fringe areas appear to be a part of the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until the majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load. 250 NW 2d at 346.

Not long after *In Re City of Fond du Lac*, the legislature, acting at the court's invitation, enacted Section 144.07 (1m). Chapter 89, Laws of 1971.

(J. A. 38). In determining *Parker* immunity, "A district judge's inquiry . . . should be broad enough to include all evidence of legislative intent." *City of Boulder*, 102 S. Ct. at 840, fn. 12. It is difficult to perceive of a clearer articulation or more affirmative expression of state policy and legislative intent. Judging from the nature and terms of statutory authority delegated to the City, it can be safely assumed that the legislature anticipated the use of that authority to preclude extraterritorial utility extensions and to require annexation prior to provision of service. Such a result is a reasonable and foreseeable consequence of the legislative action.

Going even further, the Towns make the astounding claim that even if Section 144.07 (1m) were directly applicable, the statute still is only an expression of state neutrality. (P. Brief 38). The statute presumably "does not contemplate the elimination of a competitor from the marketplace". (P. Brief 38). However, by authorizing the annexation of properties from the town into the city as a prerequisite of rendering service, the statute contemplates precisely such a result. Under Section 144.07 (1m), the city may choose to sell services to former town residents upon their annexation, while at the same time it may opt not to sell to the town itself. Section 144.07 (1m) is emphatically not a neutral enactment.

A final contention is that since the City, and not the state, "decided" to take the action complained of, the City's actions are therefore not pursuant to any "expressed state policy". (P. Brief 38). According to this view, there can be only one final decisionmaker, the state. If this is true, then any "delegation" of power by the state to its municipalities would be meaningless. Yet *Hoover v. Ronwin* (supra) confirms that there are two distinct levels

at which state authority may be exercised. The state can act directly as sovereign, or it may determine to act indirectly, by delegating its authority. Either action can result in antitrust immunity. But the argument is made that because the City is the ultimate decision-maker, no matter what the legislature intended or the degree of legislative contemplation and authorization, there can be no immunity under *Parker*. Such a position has been previously rejected by this court. *City of Lafayette* and *City of Boulder*.

**C. Town of Hallie v. City of Chippewa Falls
Buttresses the Finding of Adequate State Action.**

The brief of the Towns pointedly and inexplicably omits any reference to *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 NW 2d 321 (1982).²⁰ The case goes unmentioned even though the factual situation is identical to the case at bar, the case involved the application of the state antitrust law, the Petitioner Town of Hallie was the plaintiff in that case, and the decision was significant to both the District Court and the Court of Appeals.

The case arose under the "Little Sherman Act" of Wisconsin. The same circumstances which are present in this case existed there. The Chippewa Falls treatment plant was capable of treating sewage from the town. The town desired to utilize the city's treatment facility. The city refused, insisting upon the annexation of properties prior to service. The Town of Hallie alleged that it was a potential competitor with the city in the provision of

²⁰The City of Chippewa Falls is a Wisconsin municipality located approximately 10 miles north of the City of Eau Claire. The Town of Hallie lies between the two cities.

sewage collection services in the area of the town and that the city was tying the provision of treatment service to the acceptance of other city services. These allegations were assumed to be correct by the State Supreme Court in upholding the dismissal of the action. The court held that the city's actions were not subject to the state's antitrust law.²¹ It analyzed the same enabling statutes which are involved on this appeal. The court held that the Wisconsin legislature did not intend that a city's limiting of sewer service should be subject to antitrust scrutiny. Citing the home rule authority of Wisconsin cities²² and Sections 66.069 (2) (c) and 144.07 (1m), the court stated:

²¹The *Parker* exemption was held inapplicable since the acts of a single sovereign entity were involved. The test enunciated by the court in applying the state antitrust laws to anti-competitive actions of municipalities was "whether the legislature intended to allow municipalities to undertake such actions." The decision is not determinative here since questions of immunity and liability under the Sherman Act are a matter of federal, and not state law. However, as previously noted, the case indicates legislative contemplation and intention.

²²Even though the Seventh Circuit did not rely exclusively or even primarily upon the grant of home rule authority as conferring immunity, the Court viewed it, as judicially interpreted, as evidence of legislative contemplation. (J. A. 38-40). Home rule power alone in *City of Boulder* was inadequate to confer *Parker* immunity. *City of Boulder* is distinguishable from this case for two reasons:

1. The home rule powers conferred by the State of Colorado greatly differ from Wisconsin home rule authority. In Colorado, in matters of local concern, the legislature is forbidden to act. Article XX, Section 6, Colorado Constitution; *City of Boulder*, 102 S. Ct. at 836 fn. 1 and 843. Wisconsin cities have no power which is beyond the legislative control of the state. Article XI, Section 3, Wisconsin Constitution; *Wisconsin's Environmental Decade, Inc. v. City of Madison*, 85 Wis. 2d 518, 271 NW 2d 69 (1978). The Wisconsin home rule statute itself, conferring general powers upon cities in matters of local affairs, is prefaced with the words "(e)xcept as elsewhere in the statutes specifically provided. . . ." Wis. Stat. 62.11 (5); and

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"Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer service to the area." 314 NW 2d at 325.

Referring to Section 144.07 (1m), in response to arguments similar to those made on this appeal, the court stated:

"While the facts of the present case are clearly not covered by this statute because no DNR order is involved, this statute is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services." 314 NW 2d at 326.

The court concluded:

The city, in providing sewage services, is performing a governmental rather than a proprietary service. Its primary objective is to help ensure health and sanitation for its residents. This service resembles other governmental services such as police and fire protection which are monopolies for the public good. There is no profit motive involved and a monopoly exercised by the city is more appropriate than competition in the furnishing of such public services, even though, as here, the service can be extended beyond the geographical boundaries of the city. 314 NW 2d at 326.

Thus, a monopoly over sewer service was found to be "more appropriate than competition". The legislature was

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2. Wisconsin home rule power has been judicially construed in *Town of Hallie v. City of Chippewa Falls* to authorize municipal monopolies over sewer service.

deemed to have intended that the city should not be liable under the state antitrust law.²³ It would be illogical to conclude that the legislature contemplated that the municipal activity would be immune from state antitrust liability but subject to federal antitrust liability. Put another way, if federal antitrust liability applies to state-exempt activity, the legislature's intent is subverted.²⁴ The *Town of Hallie* case provides the ultimate refutation of the claim that state policy is neutral. The decision overwhelmingly shows that any anticompetitive effects of the city's conduct were legislatively authorized, contemplated and intended.

The Wisconsin Statutes and the *Town of Hallie* case construing them provide more than ample support for the Seventh Circuit's finding that there is a clearly articulated and affirmatively expressed state policy to displace competition with monopoly public service.

IV.

Adoption Of The Towns' Theories Would Be Extremely Detrimental To The Independent Decision-making Ability Of Local Governments.

If the foregoing theories of the Towns were adopted, the independent decision-making ability of municipalities would be severely damaged, if not destroyed entirely. Under these theories, if a city takes action on a matter without explicit state command, it acts at its peril. The City

²³The state act, of course was the only antitrust law susceptible to construction by the state Supreme Court. The state courts, in construing the state "Little Sherman Act," are to be governed by federal decisions construing federal antitrust law. *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 243 NW 2d 422 (1976).

²⁴This is just the opposite of *City of Lafayette* where Louisiana state law expressly subjected municipal instrumentalities to the state and federal antitrust laws. 435 U.S. at 414 fn. 44.

recognizes that the issue before this court is one of antitrust immunity and not liability. In terms of financial exposure and deterrent effect on municipal action, there is slight difference between the two. The mere exposure to antitrust laws, in such cases, accompanied by the time, effort and expense of defense and the potential for ultimate liability, including treble damages, would have a paralyzing effect on the ability of municipalities to provide for their needed local services.

Cases have arisen since *City of Boulder* which portend such a result. In one such case, *Unity Ventures v. County of Lake*, No. 81-C-2745 (N.D. Ill. 1984) a verdict was rendered in the amount of \$9.5 million against several governmental defendants. Trebled, the award totaled \$28.5 million. The impact of this single judgment on the communities affected was explained in hearings before the House of Representatives Committee on the Judiciary, on H. R. 6207:

"Fred L. Foreman, State Attorney for the County of Lake, testified at the Mar. 29, 1984 hearing and described the impact of a \$29 million judgment on a taxpayer in Lake County:

"The payment of this judgment would financially cripple one of the wealthiest per capita counties in the United States. If Lake County were to increase its tax rate to the maximum legal rate, it would take the taxpayers 70 years to pay this judgment and still provide necessary services to our citizens. Even if we used all our cash reserves of \$14.8 million, payment would require 35 years. If a judgment levy was used, the average homeowner with a home of an assessed valuation of \$60,000 would pay \$140.60 to satisfy this judgment. Any cutback of the county general fund or corporate fund would directly affect services such as the courts, jails and law enforcement. Historically, over the past several years, Lake

County has only increased its overall levy by an average of \$443,419 a year. That is 1.1¢ of equalized assessed valuation. Satisfaction of this judgment would require an increase of 10.1¢ of equalized assessed valuation per year for 7 years." Report 98-965, House of Representatives, 98th Congress, 2nd Session, Committee on the Judiciary, p. 10 fn. 14.

The spectre of liability or defense costs of large magnitude, on the one hand, and the "remedy" of an all-encompassing state involvement in local affairs, on the other, would have more than a chilling effect on the ability of local governments to carry out their appointed tasks. It would strike at the very heart of the basic political functions performed by local government.

V.

Active State Supervision Should Not Be Required; The Existence Of State Supervision Is Not An Issue On This Appeal.

A. Active State Supervision of Traditional Municipal Functions Is Unnecessary And Unwise.

The so-called "second prong" of immunity, "active state supervision", was first fully expressed and applied in *Midcal*. *Midcal* involved private price-fixing which was authorized by the state but which the state had left unsupervised. The requirement has not been applied by this court to a municipal government.²⁵ *City of Boulder*

²⁵The statement that the position of the Seventh Circuit was "without support in existing case law at the time" (P. Brief 39 fn. 23) is misleading in that there was an absence of case law on the point. Neither was the position contrary to then existing case law. Since *City of Boulder*, several Courts of Appeal have not required active state supervision of authorized municipal conduct. *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F. 2d 1005 (8th Cir. 1983), appeal pending; *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F. 2d 419 (8th Cir. 1983);

(Continued on following page)

expressly left open the question whether a municipality must show active state supervision over its conduct.²⁶

The Seventh Circuit decided that active state supervision was not necessary for immunity in this case. The court noted that *Midcal* involved a private price-setting mechanism which had been created by California state law, but was thereafter free from supervision. The instant case involves a completely different situation, that of a public entity performing a traditional function. In such a case, where the providing of such services on a monopoly basis is clearly articulated and affirmatively expressed state policy, going further to require active state supervision is unnecessary and redundant. The Seventh Circuit held:

"Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity

(Continued from previous page)

Scott v. City of Sioux City, 736 F. 2d 1207 (8th Cir. 1984); *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, 722 F. 2d 1284 (6th Cir. 1983); cert. den. — U.S. —, 104 S. Ct. 2387 (1984); *Golden State Transit Corp. v. City of Los Angeles*, 726 F. 2d 1430 (9th Cir. 1984); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F. 2d 805 (10th Cir. 1982), cert. den. — U.S. —, 103 S. Ct. 762 (1983). See also *Hybud Equipment Corp. v. City of Akron*, No. 83-3306 (6th Cir. August 24, 1984) holding that the nature and extent of state supervision should be "part of the general inquiry into whether the challenged actions are those of the state as sovereign."

²⁶Because the first prong of "clear articulation and affirmative expression" was not met, the Court did "not reach the question whether that ordinance must or could satisfy the 'active supervision' test focused upon in *Midcal*." 102 S. Ct. at 841 fn. 14.

even though state supervision does not exist." (J. A. 41-42).

The reasoning of the Seventh Circuit, of course, applies exclusively to local governments and not to private entities. Under its own terms, the decision of the Seventh Circuit does not apply with equal force to private parties.²⁷

A local government is a creature of the state whose very existence is controlled and supervised by the state:

"A unit of local government is a creature of the legislature. It owes its existence to legislative fiat and its life may be snuffed out by appropriate legislative action." *Scharping v. Johnson*, 32 Wis. 2d 383, 145 NW 2d 691 (1966).

When a municipality performs a traditional, basic, integral governmental function, it is not subject to business-type motivations found in the private sector. Local governments are charged with carrying out their governmental functions for public purposes, namely the health, safety and welfare of their citizens. They are subject to inherent limitations, which are applicable only to public governmental entities, such as the requirement that public funds must be expended for public purposes. *Hopper v. City of Madison*, 79 Wis. 2d 120, 256 NW 2d 139 (1977). No useful need or purpose is served by adding state supervision, defined by federal courts sitting with exclusive federal anti-trust jurisdiction, to the list of limitations.

This case is distinguishable from cases such as *Cantor* where the court indicated that compulsion must exist

²⁷The inapplicability of "active state supervision" does not even apply to all municipal activity. Contrary to the Towns' contention, the Seventh Circuit decision does not call for "total elimination" of the active supervision test, even for municipalities. The court explicitly reserved the question as to whether non-traditional local governmental functions must be actively supervised, implying that these functions "may warrant" such supervision. (J. A. 43, fn. 18).

as a prerequisite for *Parker* immunity for private parties. If the state compels the conduct, it must also oversee the conduct to assure continued adherence with the terms of the grant of authority. Such an assurance is necessary so that the anticompetitive activity continues to be directly attributable to the state and is not independent private conduct. No such concern exists with regard to a municipality operating under governmental constraints. In such a case "requiring state authorization of local conduct is analogous to requiring active supervision of private conduct; it tests whether local activity is truly state action and therefore entitled to immunity". P. Areeda, *Antitrust Law*, s. 212.a at 47 (Supp. 1982).

In the specific area of providing sewer utility services, Wisconsin cities are "arms of the state" in carrying out a state policy. In *State ex rel Martin v. City of Juneau*, 238 Wis. 564, 300 NW 187 (1941), state agencies ordered the city to install a sewage treatment system. The order was upheld, the court saying:

"Under our system of constitutional law municipal corporations and quasi-municipal corporations are arms of the state created for the purpose of exercising within their boundaries those powers conferred upon them by the legislature and discharging such duties as the state may prescribe. In no field is the power of the state broader or more general in the protection and promotion of the public health—a matter which concerns not only the state in its corporate capacity but every individual within it." 300 N.W. at 190.

In order to properly carry out the important health function of providing sewer service to its citizens, broad discretion must necessarily be given to the city. An active state supervision requirement conflicts with the ability of the state to confer such discretion.

Where a state sufficiently authorizes local government "it would be clearly pointless to require regularized supervision by some agency, authority or other arm of the state".²⁸ The state, in the final analysis, always retains the ability to change its policy and authorization granted to its municipalities.

Not only is active state supervision of a traditional function of local government unnecessary, but the Seventh Circuit found it to be unwise. If required, it would be necessary for the federal courts, having exclusive federal antitrust jurisdiction, to make the difficult determination of what constitutes "active" supervision over matters of peculiarly local concern. Given the possibility of an infinite variety of state regulation among the fifty states, the result could be a patchwork of antitrust immunity or liability, all involving the same authorized activity.

The states would be required to expend their valuable resources in implementing unnecessary supervisory mechanisms over any local matter which could be found to be anticompetitive.²⁹ These concerns are actual and immediate and not "theoretical". Even the Towns agree that active supervision "may not be required in all cases".³⁰ (P. Brief 40).

Requiring active state supervision is blithely claimed "not (to) interfere with local government's traditional exercise of powers" and not to be "an onerous requirement".

²⁸See *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal., 1984).

²⁹See *Golden State Transit Corp. v. City of Los Angeles*, 726 F. 2d at 1434.

³⁰The Towns' agreement depends on the manner of application of the first prong of *Midcal*, however. Nevertheless, the Towns' concession acknowledges that active state supervision is not always required for *Parker* immunity.

(P. Brief 42). Little elaboration is needed to demonstrate that these statements are completely inaccurate. Traditional local activities such as sewer, water, garbage, police and fire services would not only have to be supervised, but "actively" supervised by the state. The state would be placed in a position which it may not even contemplate or desire, that of having to oversee all of the numerous activities undertaken by a myriad of local governments. As an alternative, the state itself would be required to directly undertake such activities. It appears that the states are not receptive to either alternative, since they have chosen to adhere to the traditional state-local relationship based on discretionary power delegated to their municipalities.

In the words of the Seventh Circuit, requiring state supervision would "erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of the state of Wisconsin". (J. A. 42). As stated in the dissent in *City of Boulder*:

"It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself". 102 S.Ct. at 851, fn. 6.

Requiring active state supervision of traditional municipal functions would be the death knell of municipal home rule and delegated municipal authority as they exist today. It would destroy the "Dillon Rule" concept that municipalities are granted express powers by the state and possess such other implied powers as are necessary and convenient to the exercise of the powers expressly granted.³¹ There are two basic reasons why municipal

³¹See McQuillin, *Municipal Corporations*, s. 10.09; *City of Mequon v. Lake Estates Company*, 52 Wis. 2d 765, 190 NW 2d 912 (1971).

autonomy in local affairs was established and has been maintained. First, the legislature is thus relieved from the burden of having to deal with local affairs, so that it can concentrate on matters of state-wide concern. Second, local affairs require more attention and comprehensive knowledge than the state could reasonably exercise. See McQuillin, *Municipal Corporations*, s. 1.40, pp. 49-51. Requiring continuous state intrusion into such local matters would defeat these important goals.

B. Whether or Not Active State Supervision Actually Exists Is Not Before This Court.

Since the Seventh Circuit found that active state supervision was not required, the court naturally made no finding as to whether the state does in fact supervise the conduct of the City. The City brought several statutes and case law to the attention of the lower courts showing direct state involvement in sewer utility matters. These statutes pertained to the extensive review authority of the DNR over sewer utility construction and extensions and the state review of annexations.³² Because the Seventh Circuit found active supervision to be unnecessary, the court did not proceed to determine whether this legal authority met this part of the *Midcal* standard. Whether such statutes do or do not amount to "active state supervision" is not an issue here, and is a matter which should first be resolved by the lower courts.

—o—

³²See fn. 13, p. 28. The District Court found that the statutes constituted "active state supervision". (J. A. 20). The City thus strongly disagrees with the allegation that "it is clear that the state takes no role in the city's actions." (P. Brief 43).

CONCLUSION

The City is entitled to immunity from the Sherman Act under *Parker v. Brown* and its progeny. The City has acted in accordance with the clear and affirmative policies established by the legislature of the State of Wisconsin and interpreted by the Wisconsin Supreme Court. The judgment of the Court of Appeals upholding the Motion to Dismiss should therefore be affirmed.

Respectfully submitted this 14th day of September, 1984.

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APPENDIX OF STATUTES

WIS. STAT. § 62.18 (1)

Cities shall have power to construct systems of sewerage, including a sewage disposal plant and all other appurtenances thereto, to make additions, alterations and repairs to such systems and plants, and when necessary abandon any existing system and build a new system, and to provide for the payment of the same by the city, by sewerage districts or by abutting property owners or by any combination of these methods. Whenever the council shall determine to lay sewers or provide sewerage in any portion of the city it shall so order by resolution which shall describe with reasonable particularity the district to be sewerred. . . .

WIS. STAT. § 66.069 (2) (e) (1981)

Notwithstanding s. 196.58 (5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

WIS. STATS. 66.076 (8)

The governing body of any municipality, and the officials in charge of the management of the sewerage system as well as other officers of the municipality, shall be governed in the discharge of their powers and duties under this section by s. 66.069 or 66.071 (1) (e), which are hereby made a part of this section so far as applicable and not inconsistent herewith. . . .

App. 2

WIS. STAT. § 144.07 (1981)

The department of natural resources may require the sewerage system, or sewage or refuse disposal plant of any governmental unit including any town, village or city, to be so planned and constructed that it may be connected with that of any other town, village or city, and may, after hearing, upon due notice to the governmental units order the proper connections to be made or a group of governmental units including cities, villages, town sanitary districts or town utility districts may construct and operate a joint sewerage system under this statute without being so required by order of the department of natural resources but following hearing and approval of the department.

WIS. STAT § 144.01 (1m) (1981)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024 (4) is in favor of the annexation, the territory shall be annexed to the city or the village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024 (2) or the referendum under s. 66.024 (4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

NOV 15 1984

ALEXANDER L. STEVAS
CLERK

No. 82-1832

In The
Supreme Court of the United States

October Term, 1984

— o —
TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN
OF UNION and TOWN OF WASHINGTON,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

— o —
REPLY BRIEF OF PETITIONERS

— o —
CLAUDE J. COVELLI
MICHAEL P. MAY

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SUMMARY OF ARGUMENT

I. Contrary to the City's arguments, the Towns' claim is not based upon the City's refusal to sell sewage services in the unincorporated territory constituting the Towns. The Towns' complaint alleges just the opposite. Instead of alleging the City refuses to provide service in this territory, the complaint alleges the City is monopolizing sales in this geographic market.

II. The City concedes the purpose of the *Parker v. Brown*, 317 U.S. 341 (1943), exemption is to protect the State and that the goal of the *Parker* test is to isolate anticompetitive conduct attributable to the state. Accordingly, the City concedes that *Parker* exemption requires that:

. . . in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed" state policy to replace competition with regulation. [City Br. 7.]

Nonetheless, the City attempts to eliminate that conceded requirement for *Parker* exemption through the proposed "reasonable and foreseeable" test.

The reasonable and foreseeable test does not determine whether the State has clearly articulated its policy to displace competition. The premise of the reasonable and foreseeable test is that the State has permitted its municipalities to make and implement their own parochial policy decisions to engage in anticompetitive conduct. The net result of this test is that municipalities are exempt from the federal antitrust laws unless their conduct is prohibited by State law. Acceptance of this test requires that this Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), be overturned.

Lafayette and *Boulder* are correct and must not be overturned. The principles of federalism underlying these decisions require that the policies of the federal antitrust laws be impaired only when they conflict with an exercise of the state's sovereignty. To do otherwise would elevate municipalities to the status of sovereigns contrary to the principles of federalism and would severely undermine the policies of the federal antitrust laws.

The radical change suggested by the City is contrary to the principles announced by this Court. This change is unjustified particularly now that Congress has addressed municipal liability after *Lafayette* and *Boulder* and has not altered the holdings of those cases. It is unjustified now that municipalities have been relieved from the threat of treble damages.

III. The City has not established that the State of Wisconsin had adopted a policy to displace the competition in question with monopoly service by the City. The State of Wisconsin has not articulated or expressed this policy. WIS. STAT. §66.069(2) (c) and §144.07 (1m) do not address this issue. Nor does *Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 32 (1982). The most the City has established is that its conduct is not prohibited by Wisconsin law. This is not a basis for *Parker* exemption.

The City is not entitled to *Parker* exemption. The dismissal of the Towns' complaint was improper and must be reversed.

ARGUMENT

I. The Towns' Complaint Is That The City Has Acquired And Is Continuing To Use Its Monopoly Power In Sewage Treatment Services To Monop-

olize The Sale Of Other Sewage Services In The Unincorporated Territory Which Constitutes The Towns.

A motion to dismiss is not to be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The City of Eau Claire (City) acknowledges that the allegations of the Complaint must be accepted as true. (City Br. 6). Nevertheless, in its effort to obtain *Parker* exemption, the City in its very next paragraph attempts to reformulate the Towns' complaint contrary to its allegations. This cannot be permitted.

The City asserts that the gravamen of the Towns' complaint is that the City refuses to sell sewage services to any person located in the unincorporated territory constituting the Towns. (City Br. i, "Questions Presented," and City Br. 6). In fact, the Towns' complaint alleges just the opposite. The Towns' complaint alleges not only that the City offers to sell to persons located in this unincorporated territory, but that the City is monopolizing these sales by its anticompetitive acquisition and use of its monopoly power in sewage treatment services in this unincorporated territory.¹

¹ Competition between sewage utilities, similar to competition between electric utilities, generally is to secure potential customers in geographic areas not yet receiving service. This is the competition to which the Towns' complaint refers. It is the potential customers who are not yet receiving service in the unincorporated territory constituting the Towns that are the target of the City's anticompetitive conduct. Once service is established by the City in a territory, service generally is supplied on a monopoly basis and competition is at an end. For a discussion of the types of competition between electric utilities, see *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930, 934 (2d Cir. 1981); Meeks, *Concentration In The Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 81-100 (1972).

The Towns' complaint clearly alleges the City is offering service to persons in the unincorporated territory constituting the Towns:

The City has provided such [sewage treatment] services to individual land owners in the Towns if and only if such land owners agree that the City will also provide the landowners with sewage collection and transportation services. . . . [J.A. Complaint, paragraph 14, p. 5.]

The complaint alleges that the City is competing with the Towns in the unincorporated territory constituting the Towns for the sale and provision of sewage collection and transportation services. (J.A. Complaint, paragraph 6, p. 3.) It is alleged that the City has obtained and is using its monopoly power in sewage treatment services to monopolize sewage collection and transportation services in this unincorporated territory. (J.A. Complaint, paragraphs 5, 6, 14, 15-25, pp. 3, 5-6.) The City's attempt to reformulate the Towns' complaint cannot stand in light of the allegations of the complaint.

The City's brief also assumes that the Towns' complaint is an attack on the City's annexation powers. The City's annexation policies are not the subject of this suit and the Towns seek no relief in that regard. The complaint deals solely with the City's use of its monopoly power over sewage treatment service.

At most, annexation is one by-product of the City's anticompetitive conduct. By the time annexation occurs, the City's anticompetitive conduct has already had its full anticompetitive effect. Surely the City cannot avoid responsibility for this anticompetitive conduct simply by requiring this territory be annexed.

II. The Test Proposed By The City Must Be Rejected Because It Does Not Serve The Conceded Purpose Or Goal Of The Parker Exemption.

The City concedes that the purpose of the *Parker* exemption is to protect State sovereignty and therefore the objective of the *Parker* test is to isolate anticompetitive conduct attributable to the State. (City Br. 7, 10). Therefore, the City must and does concede that municipal anticompetitive conduct is exempt only if it is pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with monopoly service or regulation. (City Br. 7). It is only the State's policy to displace competition which is exempt from the Sherman Act.

Nevertheless, in the next breath the City seeks exemption without establishing the required State policy exists. This was not done openly, since the City had already admitted that this State policy is essential to fulfilling the purpose and goal of the *Parker* exemption. Rather, the City conceals its fundamental alteration of the *Parker* test in the guise of the "reasonable and foreseeable" test.

Ostensibly the "reasonable and foreseeable" test deals with the sufficiency of the State's direction or authorization to the City to implement the State's policy to displace competition. But this is a misdirection. In fact, the reasonable and foreseeable test radically changes whose policy decision to displace competition will receive exemption.

Acceptance of the City's test would do more than grant municipalities latitude in implementing the States' policy to displace competition. It would allow municipalities to create and implement their own parochial anticompetitive policies free of the restraints of the Sherman Act. This would undermine the policies of the federal antitrust laws.

Boulder, 455 U.S. at 51. It would, contrary to our principles of federalism, elevate municipalities to the status of sovereigns.²

The concepts the City espouses are nothing more than rearrangements of the concepts recently rejected in *Lafayette* and *Boulder*. They must be rejected again because, as the City concedes, the principles underlying the *Lafayette* and *Boulder* decisions remain valid today.

A. The City concedes that the purpose and goal of *Parker* exemption require that exemption be granted only if the State has clearly articulated and affirmatively expressed a State policy to displace the competition in question with monopoly service or regulation.

The Towns argued that the first prong of the *Parker* test requires two separate showings: (1) that the State as sovereign has clearly articulated and affirmatively expressed a state policy to displace the competition in question with monopoly service or regulation; and (2) if this State policy exists, that the State has directed or authorized the nonsovereign (in this case the City) to implement that policy by the type of anticompetitive conduct in question. (Towns' Initial Br. 12-29). While the City and the United States disagreed with the Towns' definition of the second showing, both concede that the first showing is a necessary element of the *Parker* test. (City Br. 7; U.S. Br. 12, 16). In particular the City states:

... The *Parker* exemption is predicated upon the need to protect State sovereignty. In order for exemption a state policy must exist to displace competition with

² *Parker's* limitation of the exemption to "official action directed by a state," is consistent with the fact that the State's subdivisions generally have not been treated as equivalent of the States themselves. *Boulder, supra*, 455 U.S. at 50-51.

regulation or monopoly public service. *City of Lafayette*. . . [City Br. 7].

Both the City and the United States describe this threshold test as follows:

... in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed state policy to replace competition with regulation". *City of Lafayette; City of Boulder*. [City Br. 7].³

Therefore, there is agreement: the threshold test for *Parker* exemption is whether the sovereign State has clearly articulated and affirmatively expressed its policy to displace the competition in question with monopoly service or regulation.

B. In spite of its concession, the City seeks to improperly eliminate the requirement of a clearly articulated State policy to displace competition.

Contrary to its admission that exemption requires that the State has clearly and affirmatively expressed its policy to displace competition, the City attempts to gain exemption without establishing this State policy. This is attempted in the City's formulation of the second showing under the first prong of the *Parker* test.⁴ The City's use

³ The United States repeatedly refers to the fact the municipality must be implementing "a clearly articulated state" policy to displace competition. (U.S. Br. 12, 13, 15 and 16).

⁴ The second showing deals with the sufficiency of the State's authorization to the City to implement the State's policy. By definition the second showing is not reached unless it has already been independently determined that the State has expressed a policy to displace competition. The City cannot be authorized to implement a policy which does not exist. Both the City and the United States erroneously accuse the Towns of requiring "compulsion" of the City to satisfy *Parker*. Whether a State must compel or merely authorize a municipality goes only to the strength of the State's direction under this second showing. It has nothing to do with whether a State policy has been clearly articulated.

of the Seventh Circuit's "reasonable and foreseeable" test creates state policy out of thin air by stacking inference upon assumption.

Contrary to the dictates of *Boulder*, 455 U.S. at 55, the "reasonable and foreseeable" test does not seek out and identify statutory evidence that the State affirmatively addressed or comprehended the displacement of competition. Instead the Seventh Circuit "assumes" the legislature contemplated this "might" occur. [J.A. 34.] This is not a test to determine whether the State affirmatively addressed the question, it simply eliminates that determination.

Having assumed the legislature contemplated the displacement of competition might occur, the Seventh Circuit "inferred" that the State "condones" this possible displacement of competition presumably because the State did not expressly prohibit it.⁵ [J.A. 34.] This is the embodiment of State neutrality which *Boulder* held was not sufficient for exemption. *Boulder*, 455 U.S. at 55.

Then the quantum leap is made. The Seventh Circuit concludes that because it has inferred that the State "condones" the City's anticompetitive conduct, the State "intended" to displace competition with the City's anticompetitive conduct. This is not a method for determining whether the State has clearly articulated its policy to displace competition. It is an elimination of that test.

The need for the "reasonable and foreseeable" test is conclusive evidence that the State has not clearly articulated and affirmatively expressed a State policy to displace competition with monopoly service or regulation.

⁵ Of course the sole basis for this inference is the Seventh Circuit's assumption that the State contemplated the City's anticompetitive conduct in the first place.

The City cannot have it both ways. It must either abandon the reasonable and foreseeable test or it must ask the Court to overturn the clear articulation test established in *Lafayette* and *Boulder*.

C. Adoption of the reasonable and foreseeable test would permit municipalities to create and implement their own parochial anticompetitive policies contrary to the policies of the Sherman Act.

~~The reasonable and foreseeable test focuses on whether the State has delegated policymaking authority to its municipalities which may be used in an anticompetitive fashion by those municipalities. The premise of this test is that the State has not clearly articulated its own policy decision regarding the displacement of competition. Rather the State has left its municipalities free to make their own policy decisions.~~

Under traditional municipal law concepts, unless the State has expressly prohibited the anticompetitive use of a delegated authority, the municipalities' anticompetitive use of that authority is reasonable and foreseeable.⁶ The

⁶ The Towns' Initial Brief pointed out that Wisconsin's statutory scheme gives municipalities *all* powers that could be given, except as expressly withdrawn by constitution or statute. Town's Initial Br. at 33, n. 20. This is the result of the home rule authority of WIS. STAT. § 62.11(5), relied on by the Wisconsin Court to hold that similar activity by a Wisconsin municipality was not prohibited under State law. *Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The consistent interpretation of this statute has been that, rather than looking for a statute to authorize its activities, a city can be assumed to have authority unless withdrawn elsewhere. *Hallie*, *supra*, 105 Wis.2d 539-40; *Wis. Assoc. of Food Dealers v. City of Madison*, 97 Wis.2d 426, 432, 293 N.W.2d 540 (1980); *Fiore v. Madison*, 264 Wis. 482, 485, 59 N.W.2d 460 (1953); *Hack v. Mineral Point*, 203 Wis. 215, 218-20, 233 N.W. 82 (1931).

Against this backdrop, the "reasonable and foreseeable" test becomes meaningless. Determining whether an act was

(Continued on next page)

City's test is a test which cannot be failed: it adds nothing to the simple question of whether an act is legal as a matter of State law. If the State prohibits certain anti-competitive municipal conduct, it is unlawful as a matter of State law. If the State does not prohibit such conduct and permits municipalities to do as they please, under the City's proposed test the conduct is exempt. Therefore, there are no situations in which municipal anticompetitive conduct is limited by the federal antitrust laws. The result is that municipalities are exempt simply because of their status as subdivisions of the State.

The difference between the *Boulder* test and the reasonable and foreseeable test is fundamental. Under the *Boulder* test, it is the State which must address and decide to displace competition and which then directs or authorizes its municipalities to implement that policy. Under the reasonable and foreseeable test it is the States' municipalities which address, create and carry out their own policies to displace competition.

(Continued from previous page)

"reasonable and foreseeable" or "contemplated" by the legislature, as that expression is used by the City, amounts to nothing more than determining if authority exists under State law for the city's actions.

Nor is the Wisconsin experience unique. Over 40 states have "home-rule" provisions of some sort, where municipalities are granted broad authority to act as they see fit. 2 McQUILLIN, MUNICIPAL CORPORATIONS, § 10.13 and n. 1, 7-8 (3d 1979). And the generally accepted interpretation of municipal authority is that it includes those powers "reasonably inferred" from powers granted. McQUILLIN *supra*, § 10.12. Thus, the "reasonable and foreseeable" test will be nothing more than an application of traditional municipal law tests to federal antitrust law, a result this Court has rejected in both *Boulder*, *supra*, 455 U.S. at 53, n. 16, and *Lafayette*, *supra*, 425 U.S. at 415, n. 45.

D. The principles announced in *Lafayette* and *Boulder* require that the reasonable and foreseeable test be rejected.

The City's argument that the reasonable and foreseeable test flows from *Boulder* is based upon a misreading of that case. The City's interpretation of *Boulder* is premised on the assumption that no State law authority existed for the City of Boulder's municipal action. (City Br. 3, 12) In fact, the Court in *Boulder* assumed just the opposite.

For the purposes of this decision we will assume, without deciding, that respondent's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the City of Boulder by virtue of the Colorado Home Rule Amendment. [455 U.S. at 53, n. 16.]

Clearly Boulder's enactment of the cable moratorium ordinance was assumed to be within the scope of power delegated to the City. Under the City's interpretation of the *Parker* test that ends the inquiry. Under the City's test it would be assumed Colorado "contemplated" this anticompetitive effect and "inferred" that the State "condoned" it. Under the City's proposed test, Boulder's conduct was exempt. But this is not the result in *Boulder*. The result was just the opposite.

The very contemplation arguments the City now makes were made and rejected in *Boulder*.⁷ The Court expressly rejected these arguments holding that Colorado was merely neutral regarding these anticompetitive actions. *Boul-*

⁷ Boulder argued that because the State granted it the power to enact cable ordinances, the State "contemplated" Boulder's enactment of an anticompetitive program. *Boulder*, 455 U.S. at 54-55. Boulder argued that it should be inferred from the authority given Boulder to regulate cable television that the legislature "contemplated" the kind of action complained of. *Boulder*, 455 U.S. at 55.

der, 455 U.S. at 55. This is nothing new. Mere lawfulness under State law was rejected in *Lafayette*. *Lafayette*, 435 U.S. at 415, n. 45. Stated another way, when the State is neutral, the policy decision to displace competition is made by the municipality and the municipalities' parochial decision to engage in anticompetitive conduct is not exempt from the Sherman Act.

The effect of the City's test would be to elevate cities to the status of sovereigns. It would permit cities to create and implement anticompetitive policies guided solely by their own parochial interests. This would serve neither the policies of the Sherman Act nor the principles of federalism. Such anticompetitive conduct not only adversely impacts cities' competitors, it impacts the persons required to buy their services from these cities. The radical shift in law the City now calls for is totally unjustified. This is particularly true now that municipalities have been relieved from the threat of treble or any damages. This is particularly true because Congress has recently considered and amended the Sherman Act after *Lafayette* and *Boulder* were decided. This Congressional amendment, although treating municipal liability under the Sherman Act, left unaltered this Court's definition for *Parker* exemption.⁸

⁸ The conference version of H.R. 6027, The Local Government Antitrust Act of 1984, (see appendix to this brief) passed by both houses of Congress after *Lafayette* and *Boulder*, does not alter in any way the test of exemption defined in those cases. The substance of the bill does not affect this case because the Towns have requested injunctive relief only, not damages. The bill does render moot many of the concerns of amici regarding treble damage liability.

III. The State Of Wisconsin Has Neither Clearly Articulated Nor Affirmatively Expressed A State Policy To Replace Competition With City Monopoly Service In The Sale Of Sewage Services In The Unincorporated Territory Constituting The Towns.

The Towns' claim is that the City is using its monopoly power in one product market, sewage treatment services, to monopolize competition in other product markets, sewage collection and transportation services. (Section I *supra*.) The geographic market in which the City is wielding its monopoly power to monopolize other product markets is the unincorporated territory constituting the Towns. (Section I *supra*.) The relief sought by the Towns is an order requiring the City to cease using its monopoly power to monopolize sewage collection and transportation services. The geographic market in which this relief is sought is the unincorporated territory constituting the Towns.

The Towns' position is straightforward. The Towns' claim involves the City displacing competition in sewage collection and treatment service in the unincorporated territory around the City with monopoly service by the City. *Parker* exemption requires that:

. . . in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed" state policy to replace competition with regulation. *City of Lafayette*; *City of Boulder*. [City Br. 7.]

Therefore the threshold issue is whether the State of Wisconsin has clearly articulated and affirmatively expressed its State policy that competition in sewage collection and transportation service be replaced by City monopoly service in the unincorporated territory constitut-

ing the Towns.⁹ Neither the City nor the United States identify a clear affirmative expression of this State policy. They do not because no such State policy exists. The threshold requirement for *Parker* exemption is not met, therefore exemption must be denied.

A. *Hallie v. City of Chippewa Falls* does not establish that the State of Wisconsin clearly articulated or affirmatively expressed a policy that the city monopolize sewage services in the unincorporated territory constituting the Towns.

The question presented in *Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982) was whether anticompetitive conduct similar to the conduct involved in this case was prohibited by State law. The specific holding in *Chippewa Falls* was that State law did not prohibit such conduct. *Chippewa Falls*, 105 Wis.2d at 542.

Chippewa Falls did not determine that the State of Wisconsin clearly articulated and affirmatively expressed a policy that competition be displaced. This is the objective of the *Parker* test which the State court unambiguously declared it was not applying. *Chippewa Falls*, 105 Wis.2d at 537-38. In addition the State court explicitly

⁹ The question is not whether State law prohibits the City's anticompetitive conduct. This conduct is prohibited by federal law applicable to the City. Rather the question is whether the State has affirmatively expressed its policy to displace competition. The question is whether the State's policy is in direct conflict with enforcement of the Sherman Act. Contrary to the City's assertions (City Br. 11), the City could exercise its State law authority in many ways without running afoul of the Sherman Act. The most obvious of these ways are for the City to offer treatment services to the Towns at a reasonable and fair price, or for a City to never acquire—under the facts of this case, to divest itself of—a monopoly over treatment services in the Towns.

refused to apply its own previously established state law rule:

... that an entity cannot be exempted from the state antitrust statute unless the conduct of the entity is within the express provisions of the conflicting [state] statute and then only if its conduct is in furtherance of the conflicting [state] statute's legislatively stated purpose. (Cites omitted and parenthetical added.) [*Id.* at 528-39.]

These declarations of what the state court was not attempting in *Chippewa Falls* unambiguously establish that the State court did not consider the federal question presented in this case.

The *Chippewa Falls* case, relying heavily if not completely on Wisconsin's home rule powers, held that this anticompetitive conduct is not prohibited by State law. *Chippewa Falls* merely establishes what was assumed *Boulder*, i.e. that the conduct in question fell within the scope of the power delegated to the City. *Boulder*, *supra*, 455 U.S. at 53, n. 16. As the result in *Boulder* establishes, this does not establish *Parker* exemption. See also, *La-Salle National Bank v. County of Lake*, 579 F. Supp. 8 at 14, n. 8 (N.D. Ill. 1984).

B. WIS. STAT. § 66.069(2) (c) does not express a State policy that competition be displaced with monopoly service.

The City and the United States suggest WIS. STAT. § 66.069(2) (c) is an inherently anticompetitive legislative statement which reflect the State's policy that the City engage in the anticompetitive conduct described in the Towns' complaint. This is not true.

Chippewa Falls does not stand for this proposition. In discussing WIS. STAT. § 66.069(2) (c), the State court said:

Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area. [*Chippewa Falls, supra*, 105 Wis.2d at 540-41.]

This language does not even address the subject of whether the State had adopted a policy that competition in sewage service be displaced with monopoly service by the City.

As has been noted above, *supra* n. 1, once a sewage utility actually commences serving a given territory, service in that territory is provided on a monopoly basis. Therefore, in Wisconsin the sewage utility has a monopolist's duty to serve persons located in that territory. *Milwaukee v. Public Service Comm.*, 268 Wis. 116, 120, 66 N.W.2d 718 (1954). WIS. STAT. §66.069(2) (c) deals with this subject.

WIS. STAT. §66.069(2)(c) states that a city or village sewage utility can decline from establishing monopoly service in an unincorporated territory and thereby avoid a duty to serve in that territory. The statutes make clear, however, that these utilities may not withdraw from a territory in which it has established monopoly service. The State policy announced in §66.069(2) (c) is that a city may decline to obtain monopoly power in a given unincorporated territory and thereby avoid a duty to serve in that territory.

There is nothing inherently anticompetitive about this State statute. Unilateral refusals to deal are not inherently anticompetitive. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). It is only when that refusal to deal is coupled with monopoly power utilized to monopolize that a violation of the Sherman Act occurs. (Towns'

Initial Br. 10-12). Nothing in §66.069(2) (c) indicates a city may monopolize sewage services in an unincorporated territory it claims it refuses to serve. If anything, this proposition is inconsistent with the policy of §66.069(2) (c).

More importantly, §66.069(2)(c) has no bearing on the allegations of the complaint. The Towns do not allege the City is refusing to provide sewage service in this unincorporated territory. The claim is just the opposite. The claim is that the City is monopolizing sales in this territory.

C. WIS. STAT. § 144.07(1m) does not grant the City any authority nor does it express a State policy that competition be displaced by monopoly service in unincorporated territories.

WIS. STAT. §144.07(1m) has no application to this case. This statute only applies when the State compels a city to serve an unincorporated territory. This has not occurred in this case. The best evidence that the State policy underlying §144.07(1m) will not be impaired by enforcement of the Sherman Act, is the simple fact the statute does not apply to the case.

WIS. STAT. §144.07(1m) certainly confers no authority on the City to monopolize sewage service in unincorporated territories. At most this statute states that competition may be displaced by monopoly service when the State through the Wisconsin Department of Natural Resources (DNR) orders it.

Chippewa Falls, 105 Wis.2d at 542, does not hold otherwise. The State court said the following regarding 144.07(1m):

While the facts of the present case are clearly not covered by this statute because no DNR order is in-

volved, this statute is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. [*Id.* at 542.]

The State court did not address the subject of displacing competition with monopoly service, or come near to applying the clear articulation test announced by this Court. The only holding that has any bearing on this case is that §144.07(1m) does not apply.

Finally, this statute has no application to the issue presented here. The City claims §144.07(1m) authorizes it to refuse to offer service in unincorporated territory. Even if this were true, the Towns' complaint alleges just the opposite. A State policy that the City may refuse to offer service is quite different from a State policy that the City may monopolize service.

CONCLUSION

The judgment of the District Court and the Court of Appeals should be reversed and the case remanded to allow the Towns to prove their allegations.

Respectfully submitted this 14th day of November, 1984.

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APPENDIX

98TH CONGRESS)
2d Session)

(REPORT
(98-1158

HOUSE OF REPRESENTATIVES
LOCAL GOVERNMENT ANTITRUST ACT OF 1984

OCTOBER 10, 1984.—Ordered to be printed

Mr. RODINO, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 6027]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6027) to clarify the application of the Federal antitrust laws to the official conduct of local governments, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

This Act may be cited as the "Local Government Antitrust Act of 1984."

SEC. 2. *For purposes of this Act—*

(1) *the term "local government" means—*

(A) *a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or*

(B) *a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,*

(2) *the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and*

(3) *the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).*

SEC. 3 (a) *No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.*

(b) *Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.*

SEC. 4. (a) *No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on an official action directed by a local government, or official or employee thereof acting in an official capacity.*

(b) *Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.*

SEC. 5. *Section 510 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.*

App. 3

SEC. 6. *This Act shall take effect 30 days before the date of the enactment of this Act.*

And the Senate agree to the same.

PETER W. RODINO,
JACK BROOKS,
DON EDWARDS,
JOHN F. SEIBERLING,
BILL HUGHES,
MIKE SYNAR,
GEO. W. CROCKETT, JR.,
CHARLES SCHUMER,
EDWARD FEIGHAN,
HAMILTON FISH,
CARLOS J. MOORHEAD,
HENRY HYDE,
DANIEL E. LUNGREN,

Managers on the Part of the House.

STROM THURMOND,
ORRIN HATCH,
HOWARD METZENBAUM,

Managers on the Part of the Senate.

App. 4

JOINT EXPLANATORY STATEMENT OF THE
COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6027) to clarify the application of the Federal antitrust laws to the official conduct of local governments, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

STATEMENT OF MANAGERS

In referring in section 4 to the application of the anti-trust laws to the conduct of non-governmental parties directed by a local government, the conferees borrowed the phrase "official action directed by" a local government from *Parker v. Brown*, 317 U.S. 341, 351 (1943); and the conferees intend that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.

App. 5

The application to pending cases of the money damage protection afforded by section 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that it would be inequitable not to apply this act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of the litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

PETER W. RODINO,
JACK BROOKS,
DON EDWARDS,
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DANIEL E. LUNGREN,

Managers on the Part of the House.

STROM THURMOND,
ORRIN HATCH,
HOWARD METZENBAUM,
Managers on the Part of the Senate.

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No. 82-1832

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION, and TOWN OF WASHINGTON,
Petitioners,
v.
CITY OF EAU CLAIRE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**BRIEF OF THE
AMERICAN AMBULANCE ASSOCIATION AND
THE CALIFORNIA AMBULANCE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Should the Court Require a Showing of Specific State Legislative Authority To Permit Local Government Immunity for Activities Violative of the Anti-trust Laws?

2. Should the Court Adopt the Ninth Circuit's Standard of State Action Immunity for Challenged Local Governmental Activity if It Will Not Require Specific State Legislative Authorization for the Challenged Activity?

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Areeda, "Antitrust Immunity For 'State Action' after <i>Lafayette</i> ," 95 <i>Harvard L. Rev.</i> 435 (1981)	7, 10, 17
Prosser, <i>Torts</i> , [4th ed. 1971] § 131, at 979	17, 18
S.1578, 98th Cong., 2d Sess. (1984)	20, 21
H.R. 2981, H.R. 3361, H.R. 3688, and H.R. 5712, 98th Cong., 2d Sess. (1984)	19, 20, 21
California Assembly Bill No. 3153, February 15, 1984	9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

No. 82-1832

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION, and TOWN OF WASHINGTON,
v. *Petitioners,*
CITY OF EAU CLAIRE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

**BRIEF OF THE
AMERICAN AMBULANCE ASSOCIATION AND
THE CALIFORNIA AMBULANCE ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

The American Ambulance Association has a current membership of approximately six hundred ambulance service companies operating in forty-nine states. The California Ambulance Association is a membership organization of approximately ninety ambulance service companies operating in California.

Ambulance providers, in general, include individual businesses and corporations operated for profit, volunteer not-for-profit associations, and local government-owned

services, which often operate out of the local fire department. The significance of the ambulance industry is indicated by its total gross revenues, \$1.5 billion (1979),¹ and number of transports, 20 million emergency and non-emergency.² In California alone, 2000 ambulance vehicles made over one million emergency medical runs during 1982.

Any ruling by this Court construing the scope of the state action antitrust immunity first set forth in *Parker v. Brown*, 317 U.S. 341 (1943), will have a direct and substantial effect on the member companies of the American Ambulance Association and the California Ambulance Association ["the Associations"]. The decision of the Seventh Circuit in *Town of Hallie, et al. v. City of Eau Claire*, 700 F.2d 376 (1983) reads the state action exemption of the Sherman Act broadly, in a manner likely to stimulate the growth of local government as a "protected entrepreneur."

A broad decision by this Court affirming *Town of Hallie* may undermine or destroy many of the thousands of existing private ambulance companies throughout the United States, including many members of the Associations, and diminish the availability and quality of ambulance service beyond the political boundary of local government monopolies.

STATEMENT OF THE CASE

Amicus accepts the Statement of the Case as set forth by Petitioners.

¹ U.S. Department of Transportation, Emergency Medical Services Division, National Safety Council Annual Report 1979.

² U.S. Department of Health and Human Services, Health Care Finance Administration Statistical Information Service, 1984.

SUMMARY OF ARGUMENT

The Court should adhere to a strict standard of state authorization and supervision of anticompetitive local government activities for state action immunity to apply. A permissive standard based on the atypical factual situation of *Town of Hallie* will encourage the more typical problem, the exclusion of private enterprise through local government as a "protected entrepreneur." A more faithful exposition of this Court's formulation in *Lafayette* is by the Ninth Circuit, not the one applied by the Seventh Circuit here.

A pending Congressional legislative enactment limiting local government liability for damages in antitrust claims argues for a showing of specific state legislative authorization to engage in the anticompetitive conduct.

ARGUMENT

I. THE COURT SHOULD DECIDE *TOWN OF HALLIE* NARROWLY AND NOT ESTABLISH BROAD DOCTRINE REGARDING STATE ACTION IMMUNITY ON AN ATYPICAL FACTUAL SITUATION.

The Seventh Circuit decision in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) applied a state action immunity standard which will sow confusion in other cases which more directly raise questions as to the permitted scope of local government as protected entrepreneur. The Ninth Circuit standard is more consistent with the Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) and *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982). An even stricter standard is needed to guide courts in reviewing the activities of local government as protected entrepreneur because of the uncertainty created by the Circuits' inconsistent applications of state action immunity doctrine.

Town of Hallie is an atypical case among those raising state action immunity issues, involving a relationship among municipalities regarding the provision of services beyond political boundaries. *Town of Hallie* does not involve a local government excluding private business from the marketplace or restraining it from competing. A typical state action immunity case is where local government engages in a business activity and by ordinance prohibits or restrains competition from any private enterprise.

This situation is better described in *Gold Cross Ambulance Co. v. Kansas City*, 705 F.2d 1005 (8th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3039 (Aug. 9, 1983), where the city purchased the assets and licenses of four private ambulance companies to operate a city-owned, profit-making ambulance service through a private management company. The city monopoly provides emergency and non-emergency service. To assure the financial success of its new venture, the city by ordinance prohibits any competition with its ambulance company within its political boundaries. The city points to a state statute permitting it to provide *emergency* ambulance services as authority not only to provide exclusive *emergency* service but also exclusive *non-emergency* service throughout the city. The statute must fairly be regarded as neutral in its competitive effect and not indicative of any state program to displace competition with regulation.

Contrast the atypical *Town of Hallie* with the typical *Springs Ambulance Service, Inc. v. Rancho Mirage*, No. 84-5509 (9th Cir., argued May 15, 1984), wherein a combination of cities passed ordinances to cripple a healthy private ambulance enterprise which had provided high-quality service for years even before the cities themselves were incorporated. The ordinances are designed to seize for the local government ambulance company a captive

market. The cities point to a patchwork of statutory authority devoid of state intent to displace competition with regulation in an attempt to cloak their anticompetitive conduct with state action immunity.

The cases percolating through the lower courts raising typical state action immunity questions involve local government efforts to seize profitable commercial activity for themselves. The inspiration is revenue enhancement rather than state planning to displace competition with regulation.

II. THE COURT SHOULD CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS STRICT REQUIREMENTS OF STATE AUTHORIZATION AND SUPERVISION FOR STATE ACTION IMMUNITY TO APPLY TO CHALLENGED CONDUCT.

A. The Court Should Require a Showing of Specific Legislative Authority to Engage in the Challenged Conduct.

This Court stated that a political subdivision need not necessarily "point to a specific, detailed, legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." *Lafayette*, *supra*, 435 U.S. at 415. As a result of this expression, the circuits have developed a bewildering variety of opinions as to the degree of specificity required in a state grant of authority needed for state action immunity to apply. The conflict among the circuits suggests that the degree of specificity required should be strengthened by adopting a standard that requires a local government to point to a specific legislative authorization before it may assert a *Parker* defense to an antitrust suit.

Indicative of the post-*Lafayette* uncertainty, several circuits have permitted local government anticompetitive behavior based on the stitching together of disparate state statutes, or by reading implications into regulatory

statutes devoid of state intent to displace competition with regulation. Several circuits have permitted local government anticompetitive conduct merely because the state regulates the activity in which the challenged conduct arises. The Seventh Circuit requires only that the anticompetitive conduct by the city "be a reasonable or foreseeable consequence of engaging in the authorized activity." *Town of Hallie v. City of Eau Claire*, *supra*, 700 F.2d at 381. In the judgment of the Eighth Circuit, a sufficient policy to displace competition exists "if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross Ambulance Co. v. Kansas City*, *supra*, 705 F.2d at 1013. The Tenth Circuit standard is the most permissive, finding immunity for various anticompetitive activities where a state statute had simply made the operation of a municipal airport a governmental function. *Pueblo Aircraft Service v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982).

The standards applied in these decisions are not in keeping with the *Lafayette* requirement that it must be "found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U.S. at 415 (*emphasis added*). The mere existence of state regulation of an activity does not give rise to an automatic antitrust exemption. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976). Yet the tendency in the Seventh, Eighth and Tenth Circuits has been toward immunity by implication rather than immunity by clearly articulated and affirmatively expressed state policy, even though "implied antitrust immunity is not favored." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720 (1975).

The imprecision in state action doctrine that must be squelched if the differences in its application by the circuits are to be reconciled is the notion that courts can "infer" unexpressed state policy intentions. See *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 717 (3d Cir. 1978); *Kurek v. Pleasure Driveway & Park District of Peoria, Ill.*, 557 F.2d 580, 590 (7th Cir. 1977); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975). This notion gained momentum with the *Lafayette* plurality's approving quotation of the Fifth Circuit's dictum that a state need only "contemplate" an anticompetitive activity to bestow immunity from the antitrust laws upon a local government implementing the activity. 435 U.S. at 415. This statement undercut the significance of the plurality's conclusion that the anticompetitive restraint be "part of a comprehensive regulatory system . . . clearly articulated and affirmatively expressed as state policy." *Lafayette*, *supra*, 435 U.S. at 410; cf. Areeda, "Antitrust Immunity For 'State Action' after *Lafayette*," 95 *Harv.L.Rev.* 435, 445 (1981).

Under this notion, all a court need ascertain to infer state intent to displace competition with the kind of conduct complained of is whether the conduct is a "reasonable or foreseeable" (Seventh Circuit) or "necessary or reasonable" (Eighth Circuit) consequence of the court-inferred state policy. The reviewing court operates in a darkness without "the pole-star by which all must be guided in ordering their business affairs" (*Lafayette*, *supra*, 435 U.S. at 406) with only the local government interests and disparate statutes and regulations generally relevant to the subject matter activity available to determine "reasonability." But the "reasonability," "necessity," and "foreseeability" of anticompetitive conduct cannot be inferred from state statutes silent as to any express intent to displace competition because "[r]easonableness is not a concept of definite and unchanging content." *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927). The anticompetitive conduct inferred to be

reasonable today may through economic and business changes become unreasonable tomorrow. Once established, the anticompetitive conduct may be institutionalized into a "traditional governmental function" because of the absence of competition. *Id.* "[I]n the absence of express legislation requiring it, [the Court] should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether [local government anticompetitive activities] are reasonable." *Id.*, 273 U.S. at 398 (*emphasis added*). Without express state policy to exclude competition, the local government foists an implied exclusion from the antitrust laws upon the state to the local government's own advantage, even though "[t]he presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions." *Lafayette, supra*, 435 U.S. at 399.

"[T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal action challenged as anticompetitive." *Boulder, supra*, 455 U.S. at 55. "Nor can those actions be truly described as 'comprehended within the powers granted' [when a court must infer state intent], since the term, 'granted,' necessarily implies an affirmative addressing of the subject [i.e., exclusion from the antitrust laws] by the State." *Id.* "A state policy preferring monopoly to competition cannot be demonstrated by inference." *Grason Electric Co. v. Sacramento Municipal Utility District*, 526 F. Supp. 276, 280 (E.D.Ca. 1981).

The pending Congressional effort to restrict treble damage claims against local governments (*see infra*, Part III) supports the proposition that more, rather than less, specificity is needed in the grant of state authority. This Court's concern about treble damage exposure for

local governments has been a motive force behind the willingness of some of the Justices to permit anticompetitive behavior by a local government even where the state legislature's grant of authority is not precise. *See Cantor, supra*, 428 U.S. at 615 (Stewart, J., dissenting); *see Lafayette, supra*, 435 U.S. at 442 (Blackmun, J., dissenting). That concern should be lessened by the enactment of the pending legislation addressing the issue. This limitation of local government liability may encourage aggressiveness on the part of local governments interested in controlling commercial activities for parochial revenue enhancement purposes. A strict Court rule on the degree of specificity needed in state authorization for immunity to apply to challenged activity will temper this aggressiveness.

Strict specificity is an achievable *sine qua non* of state legislatures for state action immunity to apply to local governmental anticompetitive conduct. State legislatures are demonstrably sensitive to providing clear-cut authority to their municipal and county subdivisions to engage in anticompetitive conduct when needed.³ The proper

³ *E.g.*, California Assembly Bill No. 3153 (February 15, 1984) provides:

SECTION 1. (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in *Community Communications Company, Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this act at the 1983-84 Regular Session of the Legislature, to prescribe and exercise the degree of state direction and supervision over emergency medical services as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed

route for a city seeking anticompetitive advantages is to its state legislature through its state representatives.

B. The Court Should Adopt the Ninth Circuit's Standard if it Will Not Require Specific Legislative Authorization for the Challenged Conduct.

The Ninth Circuit adheres to *Lafayette* by requiring a conscious state legislative displacement of the anti-trust laws for the immunization of local government anticompetitive conduct. The Ninth Circuit requires that a city demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the alleged anticompetitive actions. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). A court reviewing a local government acting as entrepreneur must focus upon the state alternative regulatory scheme which displaces competition and determine whether the challenged conduct is in furtherance of that scheme. This Court has rejected the thesis that the broadest form of state delegation, i.e., "home rule," is sufficient to permit conduct violative of the federal antitrust laws. See *Boulder*, *supra*; cf. *Areeda*, *supra*, 95 *Harv.L.Rev.* at 449.

Local governments will rely on broad expressions of generalized state authority to make self-serving decisions

functions under Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

1797.85. "Exclusive operating area" means a subarea of an EMS area defined by the emergency medical services plan for which a county grants an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support.

as to the need to control areas of commercial enterprise unless restrained by a requirement of strict authorization by the state. City-statism is fueled by local governmental desire to raise non-tax revenues or to advance political interests by expanding patronage opportunities.⁴

The Tenth Circuit's post-*Lafayette* standard, for example, could permit a beach resort city to take over local fast food operations on little more than the city's own self-serving finding that local fast food operations persistently fail to meet state health and safety requirements for food handling coupled with a legislative statement that regulation of restaurant activities is a traditional governmental activity. See *Pueblo Aircraft Service*, *supra*. Similarly, the standard of the Seventh and Eighth Circuits—that an anticompetitive activity must be merely a "reasonable and foreseeable" or "necessary or reasonable" consequence of an inferred state policy to displace competition—is open to arbitrary applications by courts reviewing challenged local government conduct. This standard looks at the reasonableness or foreseeability of the challenged conduct as it relates only to the general state regulation of the activity, without looking at either the anticompetitive consequences of the conduct or the comprehensive purpose of the state plan of regulation.

The danger of a pure "reasonableness" approach is that, when all is said and done, it depends heavily on

⁴ The attractiveness to a local government of controlling commercial markets is made self-evident by considering a cable TV franchise, the subject matter of *Boulder*. The City of New Orleans sold the right to wire its communities for cable television in 1981 in exchange for \$450,000 per year plus a 5% franchise fee expected to result in \$20 million for the city over ten years plus a \$2 million capital investment for five studios and five mobile vans plus a \$525,000 computer system for the city's library. See *Cable TV Franchising*, July 22, 1981. The economic potential of controlling the emergency and non-emergency ambulance market certainly is a factor in the decision of local government to expand into this market.

perspective. A local government will use a state statute permitting it to provide emergency ambulance service as a justification for expanding into a monopoly ambulance service for emergency and non-emergency activities, arguing that this is a more efficient economic arrangement. From the perspective of the private ambulance businesses which are destroyed, however, the local government's use of inexplicit state authority appears unreasonable. An indefinite expression by the state should not be sufficient to permit such a result because the state has the responsibility not only for providing local government but also of protecting and encouraging private business to serve all its inhabitants.

To illustrate practically, a city-owned ambulance monopoly which excludes competition within the city will beggar the ambulance services available to surrounding areas. This is because ambulance companies must have a certain volume of service to warrant maintenance of large numbers of high-quality, staffed ambulances. This volume is assured in high-density population areas like cities. These areas also promise strong competition. To balance this factor, the private ambulance companies will extend service into less-densely populated suburban and rural areas where there is less competition. If the city excludes all competition in the high-density metropolis to the advantage of its monopoly ambulance company, the surrounding areas may not provide an adequate service volume or geographically cohesive market to permit private companies to continue the high level of service possible when it also served the city's population. For example, a private company which previously competed in the city may also serve the eastern suburban and rural areas. Another ambulance company which competed in the city services the western suburban and rural areas. Excluded from the city market by the city monopoly, neither private company may have an adequate market in its respective suburb to maintain the same level and

quality of service previously possible. Also, the city's anticompetitive ordinances may bar the private companies from emergency transit priority and the use of sirens and flashing lights while traversing the city from one outlying area to the other. The exclusion of competition from the city thus undermines the quality and viability of ambulance service *in the areas surrounding the city*. Allowing the city to place its parochial interests in a less-than-comprehensive state regulatory setting endangers the interests of other areas of the state. *See Gold Cross Ambulance, supra.*

The Ninth Circuit standard focuses on the nature of the state alternative plan of regulation displacing competition. *Community Builders v. City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981). A local government may attempt to provide benefits to its residents at the expense of other residents of the state, but this should not be permitted to occur under state action immunity unless the state legislature contemplated the consequences.

For a city to claim state action immunity, it should demonstrate not only that the state intended to displace competition with regulation or monopoly public service, but also that the anticompetitive activities complained of were contemplated by and in furtherance of the regulatory ends sought by the state. The required showing under the first portion of this test is not subject to serious dispute. The *Parker* immunity doctrine was fashioned to deal with the situation where a state has decided to implement its anticompetitive policies through its subdivisions or private entities. This Court has already stated that a city must identify a state's decision to displace competition with regulation or monopoly service before it may claim state action immunity. *Lafayette, supra*, 435 U.S. at 413.

An additional showing for state action immunity must be required of a city, however, if this Court is to insure

that a city's anticompetitive acts are indeed state and not "city action." Without requiring a city to show that its anticompetitive activities were contemplated by the state and that the anticompetitive conduct was in furtherance of the state's policy, there can be no assurance that immunity will only be found where a city has implemented the state's anticompetitive policy and has not acted beyond its delegated, anticompetitive task.

The importance of requiring this additional showing is best illustrated by comparing the holding of the Seventh Circuit in this case with the Ninth Circuit's state action treatment in *Parks v. Watson, supra*. In *Parks*, the city of Klamath Falls argued that an Oregon statute authorizing city ownership of geothermal heating districts immunized its alleged anticompetitive activity in refusing to dedicate land to a developer so the city could acquire a geothermal well and thereby create a district. Had the Seventh Circuit considered the facts of *Parks* and applied its test for state action immunity, it no doubt would have held that the city's refusal to dedicate a strip of land to the plaintiff so the city could acquire a geothermal well and create a heating district was a reasonable and foreseeable consequence of engaging in the state-authorized activity of creating and operating geothermal heating districts. The Ninth Circuit found otherwise because it applied a test that assured that the conduct complained of was contemplated by the state. With language directly applicable to the case at bar, the Ninth Circuit explained:

"[M]erely because the state may authorize a city to be the sole supplier of a natural resource [or sewage treatment service] and to set prices for that resource [or sewage treatment service], it does not necessarily follow that the city is immunized from anti-trust liability where it attempts to tie the purchase of a non-monopolized product or service [such as sewage collection or sewage treatment service] to the

sale of that natural resource [or sewage treatment service]."

Parks v. Watson, supra, 716 F.2d at 663.

Certainly the state can be required to give the clear expression required by the Ninth Circuit if not the more specific expression of state authorization which this Court refused to require in *Lafayette*, but which seems all the more appealing in the light of subsequent experience.

C. Active State Supervision Should Be Required of All State Immunized Anticompetitive Activities to Insure That the Purposes of the State Regulatory Policy Supplanting Competition Are Realized.

1. *Active state supervision is necessary to assure that the challenged activity is reasonably pursuant to the state regulatory plan displacing competition.*

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), this Court imposed the condition of active supervision "by the State itself" of the challenged anticompetitive restraint without distinction as to the entity involved. 445 U.S. at 105. Yet the Circuits have uniformly disregarded this requirement with regard to "traditional governmental activities."

In *Midcal* the challenged California program fails to receive state action immunity for the want of supervision as demonstrated by the fact that "[t]he State neither establishes prices nor reviews the reasonableness of the price schedules . . ." 445 U.S. at 105 (*emphasis added*). Active state supervision insures the reasonableness of the challenged conduct in the context of the overall state regulatory program to displace competition.

The state is the only legitimate authority to consider whether the actual anticompetitive activity engaged in by a local government is consistent with the state's responsibilities to the general welfare of its residents. Only

the state has the breadth of concern adequate to insure that the challenged conduct is pursuant to state-wide, rather than city-wide, interests.

A local government cannot be empowered to supervise its own anticompetitive activity, even pursuant to clearly articulated affirmatively expressed authorization, because it is not impartial in its own program's administration. This is especially true if the Court accepts the Seventh and Eighth Circuits' standard of definition for the state authorization, i.e., that the challenged conduct be "foreseeable or reasonable" or "reasonable or necessary" consequences of such authorization. To let the local government supervise its own conduct is tantamount to letting the fox supervise the chicken coop.

2. Active state supervision is necessary to assure that the challenged activity is in furtherance of the intent of the state regulatory plan.

The challenged conduct must be both pursuant to and in furtherance of a clearly articulated affirmatively expressed state regulatory alternative to competition to immunize the conduct. Active state supervision insures that the anticompetitive activity is in furtherance of the state's goals. Without it, a local government could undertake permitted anticompetitive conduct pursuant to a state regulatory plan that actually contravenes the state's purpose of the plan.

For example, a state could legislate a regulatory plan for emergency medical services which encompasses multiple purposes. One articulated purpose is to encourage the expansion of paramedic programs. The state regulatory plan permits local governments to certify paramedic services. Another state purpose is to insure a basic amount of coverage to the residents of the state. This section of the regulatory plan permits a local government to enter into an exclusive contract with an ambulance service to provide primary response emergency care.

A local government melds the two distinct purposes into one exclusive contract with an ambulance company. The ambulance company becomes not only the exclusive emergency ambulance provider but also the sole source provider of paramedic services. As a provision of the exclusive contract, the county agrees to refuse to certify other private ambulance companies for paramedic service. Thus, the local government's exclusive arrangement contravenes the intent of the state to promote development of paramedic services, even though each step of the local government's conduct is arguably consistent with the state regulatory plan. See *Mercy Peninsula Ambulance Inc. v. County of San Mateo, et al.*, No. C84-1184 WWS (N.D.CA., filed March 13, 1984).

3. Active state supervision is necessary lest its absence impose the supervision upon the federal judiciary.

The true alternative to state supervision of anticompetitive local government activities is not local government supervision, but judicial supervision. This is because without state administrative supervision, no party with a complaint about the local government's anticompetitive conduct is going to be satisfied with an unfavorable local government supervisory decision; it will go to the courts.

4. Active state supervision is necessary for all characterizations of anticompetitive local governmental activity because the distinction between traditional and proprietary governmental activities is too elusive to permit an exemption from supervision for the former.

Several commentators have acknowledged the elusiveness of defining "traditional governmental activities." Areeda, *supra*, 95 *Harv.L.Rev.* at 443; Prosser, *Torts*, [4th ed. 1971] § 131, at 979. Yet the interest in using this distinction has persisted. See *Lafayette, supra*, 435 U.S. at 419, concurring opinion of Burger, Chief J. "It

has been said that the 'rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs.'" *Weeks v. City of Newark*, 62 N.J. Super. 166, 162 A.2d 314 (1960), *aff'd*, 34 N.J. 2250, 168 A.2d 11 (1961) *quoted in* Prosser, *supra* at 979.

The elusiveness of the distinction is illustrated, once again, by ambulance services. Ambulance companies are private, public, volunteer, or a mix of forms of ownership and operation. Providing ambulance services may change over time. The City of Santa Ana, California, for example, recently undertook the transfer of its paramedic services from its fire department to the private sector. Stout, J., "Cutting the Fog in Santa Ana," *Journal of Emergency Medical Services*, July, 1984. Ambulance services may be provided with or without fee, often depending on whether the service is emergency or non-emergency.

If use is to be made of the supposed distinction between "traditional" governmental activity and "proprietary" local governmental activity, the distinction should not be to differentiate the applicability of the supervisory requirement to the activity. Rather, the standard should require state supervision of all anticompetitive activity, but recognize the need for a lesser amount of supervision where "traditional governmental activities" are involved. That is, the distinction should go to the *degree* of active supervision that is to be required of the state. Moreover, the distinction should be made based upon how the local government finances the service provided. Fee-for-service kinds of activities should be held to be "proprietary." Services where specific payment of a fee for the service rendered is absent, such as fire and police services, could be defined properly as "traditional governmental activities."

III. CONGRESS IS ENACTING LEGISLATION LIMITING LOCAL GOVERNMENT LIABILITY FOR DAMAGES UNDER THE SHERMAN ACT AND EFFECTIVELY RATIFYING THE COURTS' EXISTING STANDARDS OF AUTHORIZATION AND SUPERVISION.

The United States Senate during this 98th Congress, 2d Session, unanimously approved legislation eliminating local government liability for treble or compensatory damages under the Clayton Act, 15 U.S.C. §§ 15, 15a, and 15c, but leaving intact injunctive relief and award of costs and fees.⁵ H.R. 5712, Making Appropriations for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies for Fiscal Year 1985, was amended to contain this measure. H.R. 5712, 98th Cong., 2d Sess. (1984). It will be before a Senate-House Conference committee at the time of filing of this brief.

The significance of this legislation is four-fold.

⁵ The text of the relevant provision of H.R. 5712 (98th Cong., 2d Sess.) is:

ADMINISTRATIVE PROVISION

SEC. 1. (a) Sections 4, 4A, and 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) shall not apply to any law or other action of or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment or provision of public services on an exclusive or non-exclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons, where such law or action is valid under State law.

(b) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, and 15c) from any unit of local government or official thereof acting in his official capacity.

First, it implicitly ratifies the Court's requirements that a state must itself direct or authorize a local government anticompetitive practice (*Lafayette*) and that such anticompetitive conduct must be supervised (*Midcal*). Both standards were exhaustively reviewed by committees in both chambers of Congress during three days of hearings. See H.R. 2981, H.R. 3361, and H.R. 3688, 98th Cong., 2d Sess. (1984).

Second, the legislation expressly addresses an issue of concern to some Justices, i.e., that local governmental conduct violative of the federal antitrust laws could result in large treble damage awards. See *Cantor*, *supra*, 428 U.S. at 615, Stewart, J., dissenting; *Lafayette*, *supra*, 435 U.S. at 442, Blackmun, J., dissenting.

Third, by removing the threat of damages in some instances, the Congress is removing an objection to a strict Court rule on the specificity of state authority needed to immunize anticompetitive conduct. The failure to enforce a strict rule against local governments will encourage them to expand anticompetitive conduct because they have less to fear even if a court determines that the actions were violative of the antitrust laws.

Fourth, the legislation acknowledges the "proprietary" versus "traditional" government activity distinction suggested by Chief Justice Burger, concurring opinion, *Lafayette*, 435 U.S. at 419. "Traditional" local governmental activity will be insulated from treble or compensatory damages for anticompetitive conduct even where no state action immunity was found to exist. These include "zoning, franchising, licensing, and the establishment of public services on an exclusive or nonexclusive basis in manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons." See S.1578, 98th Cong.,

2d Sess. (1984), amending H.R. 5712, *supra*. The decision not to extend this insulation to local government activities in the "purchase or sale of goods or services on a commercial basis . . . in competition with private persons" is also a considered Congressional expression indicating its desire to protect free enterprise in markets where it already exists.

From time to time Congress has expressly considered and acted on the question of Sherman Act immunity for various state activities. Justice Blackmun noted the significance of these expressions in *Cantor v. Detroit Edison Co.*, *supra*, 428 U.S. at 607 (concurring opinion, Blackmun, J.). He found that Congress intended the federal antitrust laws to pre-empt inconsistent state laws.

Justice Blackmun provides a succinct history of Court action and Congressional reaction on particular activities found to be anticompetitive by the Court but deemed worthy of exemption by the Congress. *Id.* These express grants of Sherman Act immunity are significant, since "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States v. Borden Co.*, 308 U.S. 188, 201 (1939).

CONCLUSION

Wherefore, Amicus respectfully requests that the Court require specific state legislative authority and supervision of anticompetitive local government activities for state action immunity to apply to such activities, or, in the alternative, that the Court adopt the Ninth Circuit's standard, i.e., that the challenged conduct be shown to be pursuant to and in furtherance of a clearly articulated, affirmatively expressed, comprehensive state policy intended to displace competition.

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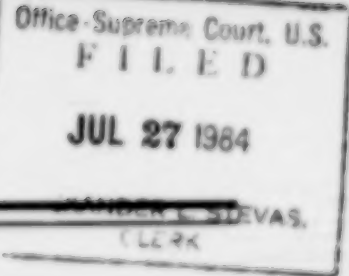
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No. 82-1832



IN THE
Supreme Court of the United States
October Term, 1984

TOWN OF HALLIE, ET AL.,
Petitioners,
vs.
CITY OF EAU CLAIRE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE TOWN OF
ST. CLOUD, MINNESOTA**

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**BRIEF OF AMICUS CURIAE THE TOWN OF
ST. CLOUD, MINNESOTA**

I.

INTEREST OF THE AMICUS CURIAE

The Town of St. Cloud, Minnesota, is an urban town of the State of Minnesota, acting pursuant to the authority and powers granted to it by the Minnesota Legislature under the provisions of the Minnesota Constitution and Statutes.¹

¹No letters of consent from the Petitioners and Respondents to the filing of the brief have been obtained since, under Rule 42(4), *amicus curiae* Town of St. Cloud need not obtain such consent as a political subdivision of a State which is filing an *amicus curiae* brief sponsored by its authorized law officers.

The interest of the Town of St. Cloud in this case is based upon a pending action that it has commenced in the United States District Court for the District of Minnesota, *Town of St. Cloud v. City of St. Cloud*, Civil Action No. 6-84-164. That action, like the one pending before the Court, involves a challenge to the City of St. Cloud's practice of requiring annexation of areas of the Town as a prerequisite to the receipt of wastewater treatment services by the residents therein. Many of the legal issues in that action are similar to the one at hand, and a decision by the Court in this case may have an impact upon the pending action of *amicus curiae*.

II.

PRELIMINARY REMARKS

Our purposes in appearing as an *amicus curiae* before this Court is to support the position of our fellow townships in the pending action, and to reaffirm the principle that a municipality, as well as any other form of local government, is bound by the antitrust laws of this nation, and cannot hide behind the veil of alleged state authority for anti-competitive actions in illegally exploiting a monopoly over wastewater treatment services in such a manner as to destroy neighboring communities as developing and competing taxing jurisdictions.

Like the City of Eau Claire, the City of St. Cloud, on behalf of itself and various other area communities, applied in the early 1970's for a federal grant under the Federal Water Pollution Control Act (33 U.S.C. § 466 *et seq.*, now covered by 33 U.S.C. § 1251, *et seq.*) for a federal construction grant to build a wastewater treatment facility for the St. Cloud Metropolitan Area. That area includes the City of St. Cloud and various surrounding incorporated

and unincorporated local government units, including the Town of St. Cloud. The federal grant was made after various conditions were set and agreements made between the Federal Government, State of Minnesota and the City of St. Cloud. The wastewater treatment facility commenced service in 1975.

The City of St. Cloud subsequently entered into agreements with two adjoining cities for wastewater treatment services. Those two cities currently transport wastewater to the St. Cloud area facility for treatment. The City is currently negotiating similar agreements with two other nearby cities. Annexation to the City of St. Cloud is not a condition of any of these agreements.

The wastewater treatment facility is located within the corporate limits of the City of St. Cloud. Because of the location of the facility in the City limits, and because the treatment facility is controlled by the City, the City, in effect, enjoys a monopoly power of control over the facility.

The Town of St. Cloud has intended to construct its own sewer system for the collection and transportation of wastewater to the interceptors within the city limits and from there to the treatment facility. However, the City has consistently refused to allow the Town to connect its sewers for the transportation of wastewater to the treatment facility, unless the Town agrees to onerous annexation terms. Also, certain City officials have made threatening statements to the officials of the Town concerning exorbitant prices the City would exact from the Town as a condition to the Town tying its sewers into the St. Cloud area wastewater treatment system.

It has also come to the attention of the officials and counsel for the Town that various anticompetitive tying

arrangements, combinations and other illegal contracts, agreements and arrangements for wastewater treatment services have resulted from the actions of the City in coercing individuals, land developers and other entities to annex to the City as a precondition to receiving wastewater treatment services.

The above facts formed the basis for the Town of St. Cloud's complaint against the City of St. Cloud, filed in U.S. District Court for the District of Minnesota, in early February, 1984. The Town's bases for jurisdiction, among others, were section 2 of the Sherman Act (15 U.S.C. § 2); the Federal Civil Rights Act (42 U.S.C. § 1983); and a pendent state claim under the Minnesota Antitrust Act (*Minn. Stat.*, Ch. 325D, *et seq.*). The City of St. Cloud moved to dismiss the Town's complaint, based on the "state action" exemption announced by this Court in *Parker v. Brown*, 317 U.S. 341 (1943).

On May 14, 1984, the District Court, ruling from the bench, found that the state action exemption did not apply in the case, and denied the City's motion to dismiss the state and federal antitrust and civil rights claims. We believe that such analysis is applicable not only to the *City of St. Cloud* case, but also to the case at hand.

III.

ARGUMENT

A. The State action doctrine demands legislative specificity.

The Supreme Court held in *Parker v. Brown*, *supra*, that the federal antitrust laws, specifically the Sherman Act, did not reach actions directed by a state legislature. Further-

more, in *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978), a plurality of the Supreme Court held that municipalities were protected from anti-trust liability when they acted "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413. Furthermore, the Court found that the state policy need not be spelled out in great detail; a finding only had to be made that the legislature contemplated the kind of action complained of, in granting a governmental entity the authority to operate in a particular area. *Id.* at 415.

In *Community Communications Co., Inc., v. City of Boulder, Colorado*, 455 U.S. 40 (1982), a majority of the Supreme Court adopted the *City of Lafayette* plurality opinion as the majority rule, adding the requirement that to be exempt under the Sherman Act, the municipal action must be "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id.* at 52. The state action doctrine "is not satisfied when the state's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Id.* at 55 (emphasis in original).

In a recent, detailed analysis of the state action antitrust exemption in the municipal wastewater treatment context, the U.S. District Court for the Northern District of Illinois set forth the following rule in *Vickery Manor Service v. Village of Mundelein*, 575 F. Supp. 996, 999 (D.C., N.D., Ill., 1983) (emphasis added):

"*City of Boulder* established an important guide for future cases: a general grant of power to a local governmental unit does not necessarily immunize subsequent anticompetitive conduct pursuant to that grant.

Thus, as in *City of Boulder*, a municipality's actions may clearly be lawful under state law but not lawful under federal antitrust law. 455 U.S. at 52, n. 15, 102 S.Ct. at 841, n. 15. *Courts scrutinizing antitrust claims against municipalities therefore should look not at whether the municipality's action was authorized under state law but whether the municipal action was pursuant to a specific legislative intention that competition could be displaced.*"

The *Vickery Manor* court considered all the major state action exemption cases, in ruling upon a motion to dismiss an antitrust complaint brought by a group of plaintiffs against a municipality that asserted monopoly powers over sewage treatment services in a manner so as to displace competition from plaintiffs. The District Court in *Vickery Manor* analyzed a state statutory scheme involving sewage treatment services and found that the state statutes made no mention whatsoever of monopoly power for municipalities, but were merely neutral grants of power under the Supreme Court criteria in *City of Boulder*. *Vickery Manor*, *supra* at 1004. The District Court went on to state that a municipal action must not merely be lawful under state law but must be pursuant to a legislative intent to permit the displacement of competition in order to qualify for the state action exemption. *Id.*

B. The Minnesota statutory scheme is an example of a neutral state scheme contemplated in the *City of Boulder* case.

In Minnesota, the legislature has made extensive grants of power and authority to both towns and cities concerning wastewater treatment services. In Minnesota, towns are

divided into two categories, towns and urban towns. Towns are generally governed by and are subject to the provisions of *Minn. Stat. Ch. 365*. This form of unincorporated local governmental entity has somewhat limited powers. Urban towns, like the Town of St. Cloud, are a form of unincorporated local government that have been granted special, extensive powers by the legislature in addition to the other powers granted towns in general, and enjoy broad police powers regarding the public peace, health, safety and welfare such as that enjoyed by a city. Urban towns are defined at *Minn. Stat. §368.01, subds. 1 and 1a*. In effect, a Minnesota urban town is an unincorporated municipality. See generally, *Minn. Stat. §368.01, et seq.*

The extensive powers granted urban towns by the State of Minnesota includes wastewater treatment services, sewers and waterworks. For example, *Minn. Stat. §368.01, subd. 3*, grants urban towns the power to establish and maintain sewers and to alter, widen or straighten water courses. *Minn. Stat. §368.01, subd. 6*, gives urban towns the power to provide and by ordinance to regulate the use of wells, cisterns, reservoirs, waterworks and other means of water supply. Under *Minn. Stat. §368.01, subd. 14*, an urban town may provide for or regulate the disposal of sewage and to provide for the cleaning of and the removal of obstructions from any waters in the town and prevent their obstruction or pollution. Furthermore, an urban town has the power of eminent domain equal to a city for the purpose of acquiring rights-of-way for sewage or drainage purposes and an outlet for sewage and drainage within or without the town limits (*Minn. Stat. §368.01, subd. 27*). A town may also specially assess property owners for sewer improvements under *Minn. Stat. §429.011, subd. 2*.

The Minnesota Statutes contain many other provisions granting towns in Minnesota, particularly urban towns, various police and other broad powers which parallel the grants of authority given to incorporated municipalities by the legislature.²

The existence of specific Minnesota statutes granting urban towns broad police powers and extensive powers concerning the construction and financing of sewers and wastewater treatment facilities, among others, evidences a neutral legislative intent allowing towns to compete with cities for the provision, purchase and receipt of commodities and services, and the development of taxing base that ensues. There is no Minnesota statute specifically or even impliedly requiring annexation as a precondition to provision of or extension of sewers or wastewater treatment services to a town by a city.³

C. A city may not abuse its monopoly over wastewater treatment services so as to harm a competing taxing subdivision.

A statement from another recent U.S. District Court decision concerning a case brought under state and federal antitrust and civil rights laws and other grounds, is applicable to the case before the Court, and holds that unlawful exploitation attempted by a governmental monopolist, such

²See, e.g., Minn. Stat. §368.01, subd. 19 (general police powers); Minn. Stat. §368.01, subd. 28 (additional powers as possessed by cities); Minn. Stat. Ch. 365 (general provisions).

³See Minn. Stat. §444.075, subd. 3, which sets forth that a city must "impose just and equitable charges for the use and for the availability of such facilities and for connections therewith" (emphasis added). That subdivision also contains language regarding "reasonable charges" to be charged by a city for various services, including sewage treatment.

as the City herein, rises to a violation of federal antitrust law:

"Nothing in the statutes or regulations cited by defendants authorizes or even contemplates that defendants' power could be used to such an end [monopoly power over sewage treatment]. It is one thing to say that defendants were authorized under state law to control sewage treatment in their region. But even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization."

LaSalle National Bank v. County of Lake, 479 F. Supp. 8, 14 (D.C., Ill., 1984), citing *City of LaFayette, supra*, at 389.

In the *City of St. Cloud* case, as in this case, a city has attempted to wield its monopoly control over wastewater treatment services so as to force town residents and property owners to annex to the city in a manner not contemplated or authorized by the laws of the state. This illegal, anticompetitive conduct can hardly be termed a "traditional municipal function," as the Seventh Circuit erroneously termed such activity in the decision under review. See *City of Eau Claire, supra* at 384-85.

IV.

CONCLUSION

We submit that a political subdivision of a state can be held liable under the federal antitrust laws for the abuse of monopoly control of wastewater treatment services, when the state statutory scheme, such as that found in Minnesota, is neutral with regard to the provision of such services. "Use

of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." Douglas, J., writing for the majority in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

This case is far more than a political controversy over annexation. It is the assertion of the rights of the citizens, property owners and taxpayers of the petitioning towns to purchase, on just and reasonable terms, a vital commodity and service, wastewater treatment, from the City of Eau Claire, which has been entrusted with control of the area wastewater facility built in part with federal funds, moneys generated in part by the taxpayers of the towns.

For the reasons set forth herein, *amicus curiae* Town of St. Cloud respectfully requests the Court to reverse the decision of the Seventh Circuit Court of Appeals, and remand the matter to the District Court for a determination on the merits.

Respectfully submitted,

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No. 82-1832

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

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VS.

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Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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**BRIEF OF AMICUS CURIAE PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for PLF is

established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The antitrust laws of the United States were intended to protect competition and preserve economic freedom and our free enterprise system. Under our federal system, states, when acting as sovereign, are not prevented by the federal antitrust laws from interfering with uninhibited competition. However, municipalities are not entitled to the same deference and, therefore, are subject to the federal antitrust laws.

If municipalities are allowed to restrain competition by favoring their own parochial interests the purpose of the federal antitrust laws will be frustrated. PLF believes that the decision of the Court of Appeals for the Seventh Circuit in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), fails to follow the guidelines established by this Court in its previous decisions on the "state action" exemption and believes that the standards established by the Court of Appeals' decision are inconsistent with the policies of the federal antitrust laws.

Pacific Legal Foundation's public policy perspective in support of competition and the free enterprise system will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 700 F.2d 376 (7th Cir. 1983).

STATEMENT OF THE CASE

Petitioners herein are four Wisconsin townships located adjacent to respondent, City of Eau Claire. Respondent used federal funds to construct a sewage treatment facility within its own city limits. This sewage treatment facility is the only such facility available to petitioners and, as a result, respondent enjoys a monopoly in the market for sewage treatment services. Respondent refused to supply sewage treatment services to petitioners, but has provided sewage treatment services to individual landowners within petitioners' boundaries on condition that such landowners agree to annex to respondent and obtain sewage collection and transportation services from respondent. *Town of Hallie v. City of Eau Claire*, No. 80-C-527, slip op. at 1 (W.D. Wis. April 5, 1982). This conduct by respondent prevented petitioners from competing with respondent in providing sewage collection and transportation services to the landowners.

In *Town of Hallie v. City of Eau Claire*, the District Court held that respondent was exempt from the Sherman Act under the "state action" exemption originally articulated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and dismissed petitioners' antitrust claims. On appeal the Court of Appeals for the Seventh Circuit affirmed the District Court's decision, stating "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services,

then we can *assume* that the State contemplated that anti-competitive effects might result from the conduct pursuant to that authorization." 700 F.2d at 381 (emphasis added). Additionally, the court held that it was not necessary for upon an assumption that if the state authorized conduct then of the municipality to come within the state action exemption. *Id.* at 384.

SUMMARY OF ARGUMENTS

1. In reaching its decision the Court of Appeals relied upon an assumption that if the state authorized conduct then the state contemplated the anticompetitive effect of such conduct. Congress intended that the antitrust laws be given the broadest application. The assumption utilized by the Court of Appeals is contrary to this intent and jeopardizes the national policy of open competition embodied in the antitrust laws.

2. Active state supervision of the anticompetitive conduct of municipalities is necessary to ensure that the conduct being exempted is truly state action and that the municipality will not abuse its anticompetitive power.

ARGUMENT

I

INTRODUCTION

The decisions of this Court provide that anticompetitive conduct by government is exempt from the federal antitrust laws if the conduct constitutes the action of the state itself, acting in its sovereign capacity, or if it constitutes municipal action in furtherance of a clearly articulated and affirmatively expressed state policy to displace competition with

regulation or monopoly service. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982); *Parker v. Brown*, 317 U.S. at 350-51.

In its opinion below, the Court of Appeals held that "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can *assume* that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization." *Town of Hallie v. City of Eau Claire*, 700 F.2d at 381 (emphasis added). Additionally, the court held "that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity." *Id.* at 384.

The question presented is what indicia of state involvement are sufficient to clothe a municipality with a state's exemption from the application of the federal antitrust laws. It is respectfully submitted that the standards utilized by the Court of Appeals are inadequate. The decision grants a broad scope of immunity which is contrary to the intent of Congress that the antitrust laws be applied to the full extent of the power of Congress under the Commerce Clause.

II

RELIANCE ON AN ASSUMPTION THAT THE STATE CONTEMPLATED ANTICOMPETITIVE EFFECTS FRUSTRATES THE INTENT OF CONGRESS THAT OPEN COMPETITION BE GIVEN THE BROADEST POSSIBLE PROTECTION

When Congress enacted the federal antitrust laws it intended to exercise to the fullest its power under the

Commerce Clause of the United States Constitution. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980). Consistent with this congressional intent there is a strong presumption against implied exclusion from coverage under the antitrust laws. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 398. As this Court stated in *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975), "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *Id.* at 719-20.

The "state action" exemption from the antitrust laws was originally created because of this Court's concern with protecting our federal system of government. In *Parker v. Brown*, 317 U.S. at 350-51, this Court stated:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, when first presented with the question whether a municipal government would be exempt from the provisions of the Sherman Act because of its status as a municipality, a plurality of this Court, relying upon *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), reasoned:

"These decisions require rejection of petitioners' proposition that their status automatically affords government entities the 'state action' exemption. Parker's limitation of the exemption, as applied by *Goldfarb* and *Bates*, to 'official action directed by [the] state,' arises from the basis for the 'state action' doctrine—that given our 'dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . . a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred.' To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them Parker's limitation of the exemption to 'official action directed by a state' . . . is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 411-13 (citations omitted; footnotes omitted).

The plurality opinion in *City of Lafayette* and subsequent cases, see *Community Communications Co. v. City of Boulder*, *supra*, indicate that the "state action" exemption enunciated in *Parker v. Brown* was intended solely to protect the sovereignty of the states while at the same time fulfilling Congress' intent to protect uninhibited competition.

The Court's indulgence of municipalities does nothing to preserve the states' sovereignty. At most it excuses the state from having to clearly articulate that its legislation is intended to displace competition with regulation or monopoly service. However, when the state fails to clearly

articulate its policy to displace competition it is impossible to balance the states' interest against the national policy of free markets and open competition expressed by Congress in the federal antitrust laws. The Court of Appeals' analysis fails because it assumes that the state intended to displace competition with regulation or monopoly service.

In *Parker v. Brown*, the Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" 317 U.S. at 351. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773; *Cantor v. Detroit Edison Company*, 428 U.S. 579 (1976); and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, this Court refused to grant state action exemption in situations where the state had authorized the anticompetitive activity. Implicit in these decisions is a recognition that there are situations in which the activity authorized by the state may have anticompetitive effects not contemplated by the state, and therefore would not be the actions of the state. The plurality opinion in *City of Lafayette v. Louisiana Power & Light Co.*, expressly considered this point: "it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the state." 435 U.S. at 406 n.31.

Municipalities continue to be exempt from the provisions of the antitrust laws if they are acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. The states

continue to be free to immunize municipalities from liability under the federal antitrust laws by simply stating that the states deem it to be in the public interest to displace competition with regulation in a field. However, the mere existence of a grant of authority to operate in an area does not establish that a municipality is operating as an agent of the state. By assuming the state contemplated anticompetitive effects merely because the state authorized the conduct involved, the Court of Appeals failed to give effect to the policy enunciated by Congress in the antitrust laws and the strong presumption against implied exemptions from such laws.

III

ACTIVE STATE SUPERVISION IS NECESSARY TO ENSURE THAT ONLY STATE ACTION IS EXEMPT FROM THE CONGRESSIONAL PROHIBITION OF ANTICOMPETITIVE CONDUCT

In its decision, the Seventh Circuit Court of Appeals held that it is not necessary for the state to actively supervise the anticompetitive conduct of a municipality in order for that conduct to come within the state action exemption. 700 F.2d at 383-84. The Court of Appeals distinguished *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, which required active state supervision for the exemption to apply, 445 U.S. at 105, on the grounds that *Midcal* "involved private parties that were given power over price" whereas "[t]his case involves a local government performing a traditional municipal function." 700 F.2d at 384. However, this distinction is without meaning in light of the purpose of the "state action" exemption and is not supported by the court's reasoning.

When a municipality is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, it is exempt from the antitrust laws because in our dual system of government the state is entitled to choose to "effect its policies through the instrumentality of its cities and towns." *Community Communications Co. v. City of Boulder*, 455 U.S. at 51. The municipality is not immune from the antitrust laws because it possessed independent sovereign power. This notion was rejected by this Court in *Community Communications Co. v. City of Boulder*, 455 U.S. at 54. The municipality is immune only when it acts as an instrument or agent of the state to carry out state policy. However, in distinguishing this case from *Midcal Aluminum*, the Court of Appeals failed to consider the basis of the exemption and relied heavily on the fact that the case involved a municipality with independent authority.

The court reasoned:

"In this context [where the state chose to implement its policy through private parties], the requirement of active state supervision ensures that private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake." 700 F.2d at 384.

The Court of Appeals continued that, with respect to this case, such supervision is unnecessary because "local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority." *Id.*

Such reasoning ignores reality and the cases which have previously come before this Court. Many municipalities

act pursuant to their own police power. *Community Communications Co. v. City of Boulder* presented one such instance. With respect to such municipalities, the Court of Appeals' reasoning is completely misplaced. Even in situations where local government entities are authorized to operate in certain areas by state law, it is not assured that restraints will be placed on the exercise of the power by local entities or that the local entities will exercise that power in a way consistent with state policy.

In *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (N.D. Ill. 1984), a case currently pending in the United States District Court for the Northern District of Illinois, it was alleged that the defendants, a county and a municipality, used their monopoly power over sewer service to prevent the development of land. *Id.* at 13. In denying defendants' motion to dismiss plaintiffs' antitrust claims on the ground that their action was exempt under the "state action" exemption, the court stated:

"We have studied in detail the authorities cited by defendants in support of their immunity argument and do not find them convincing. We do not find in any of these statutes and regulations a legislative intent to permit a local governmental unit to use its powers in the sewage treatment field simply for the purpose of stopping the development of land. . . . Nothing in the statutes or regulations cited by defendants authorizes or even contemplates that defendants' power could be used to such an end. It is one thing to say that defendants were authorized under state law to control sewage treatment in their region. But 'even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.'" *Id.* at 14 (citations omitted; footnotes omitted).

Although it has yet to be decided in *LaSalle National Bank v. County of Lake* whether or not the defendants actually abused their power in the manner alleged, the case demonstrates that it is entirely possible for a municipality to utilize a specific grant of authority for an anticompetitive purpose which is inconsistent with the state's policy. See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 406 n.31 (it would not hinder governmental programs to apply antitrust laws to a city authorized to provide services on a monopoly basis if the conduct complained of was not itself directed by the state).

Finally, the Court of Appeals reasoned that "[a] requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin." 700 F.2d at 384. This Court addressed a similar argument in *Community Communications Co. v. City of Boulder* in which it was argued that to deny the "state action" exemption in that case would have serious and adverse consequences for cities and would unduly burden the federal courts. The court rejected this argument by stating "this argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." 455 U.S. at 56 (footnote omitted). Additionally, the conclusion of the Court of Appeals is simply a restatement of the argument rejected by this Court in *Community Communications Co. v. City of Boulder* where it was held that the "Colorado Home Rule Amendment's 'guarantee of local autonomy,'" 455 U.S. at 54, did not immunize the city from application of the federal antitrust laws. *Id.* at 55-56.

The "state action" exemption is not designed to protect local autonomy. It was created because of the recognition that states, acting as sovereign, may choose to effect their policy through the instrumentality of their cities. *Id.* at 51. To require that the state supervise the anticompetitive conduct engaged in by a city when carrying out the state's policy will not interfere with the sovereignty of the state. However, as is the case when the state implements its policy through private parties, active state supervision of the municipality's conduct will ensure that the municipality does not abuse its anticompetitive power and that it acts pursuant to the state policy at stake. As was recognized by the plurality in *Lafayette v. Louisiana Power & Light Co.*:

"[Local governmental units] may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408 (footnote omitted).

To require active state supervision of the anticompetitive conduct of municipalities would help to preserve the free markets and open competition embodied in the antitrust laws.

With respect to anticompetitive conduct engaged in by private parties pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, active state supervision tests whether the challenged activity is

truly state action and, therefore, immune. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 104-06. *See also* P. Areeda, *Antitrust Law* § 212a at 47 (Supp. 1982). Active state supervision of the anticompetitive conduct of municipalities would serve this same function. It would demonstrate that the activities for which immunity is claimed by the municipality are truly state action.

CONCLUSION

The "state action" exemption from the antitrust laws results from a recognition that ours is a dual system of government and is designed to protect the sovereignty of the states. Balanced against these policies is the policy embodied in the federal antitrust law to protect uninhibited competition and our free enterprise system. The minimal indicia of state action utilized by the Court of Appeals to determine whether the conduct by the City of Eau Claire was an action of the state are inadequate. A substantial probability has been created that municipalities may override the policies of the Congress of the United States. Therefore, PLF respectfully urges that the decision of the Court of Appeals for the Seventh Circuit be reversed.

July 26, 1984.

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No. 82-1832

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CLERK

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION AND TOWN OF WASHINGTON,
Petitioners,

v.

CITY OF EAU CLAIRE,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

**AMICI CURIAE BRIEF FOR THE COMMONWEALTHS OF
VIRGINIA AND PENNSYLVANIA AND THE STATES OF
NEVADA, CONNECTICUT, MINNESOTA AND UTAH**

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INTEREST OF THE AMICI STATES

The Commonwealth of Virginia and five of her sister states,¹ by their Attorneys General, submit this brief in support of respondent, the City of Eau Claire, Wisconsin. The states have a significant interest in the outcome of this case.

A paramount interest of the amici states is to maintain a workable structure for state-local relations. There are more than 67,000 units of local government in the United States.² Each local government exists in an environment

¹ The Commonwealth of Pennsylvania and the States of Connecticut, Minnesota, Nevada, and Utah.

² This figure includes municipalities, counties, townships, and special districts. It excludes school districts. U.S. Department of Com-

shaped by state law. Most, if not all, engage in activities which affect local, regional, or national commerce. In determining whether those activities run afoul of the Sherman Act, the courts have focused repeatedly on state law to determine the level of state authorization for the challenged activity. Consequently, the undersigned states urge the adoption of a rule which affords reasonable protection to local activities without mandating a massive revision of state law. Further, the states urge adoption of a test which recognizes the tremendous burden imposed upon the states if they are required to engage in "active supervision" of local activity.

Of equal significance is the states' interest in vigorous enforcement of the antitrust laws. Localities engage in a panoply of activities which displace free operation of the market. Those activities range from purely commercial enterprises in which government is a market participant to regulatory activities involving the provision of public services. Activities lying at the core of a local government's power to regulate public health, safety, and welfare should be protected from Sherman Act scrutiny. Unless and until Congress establishes an exemption from antitrust liability for units of local government, the Court should reconcile the national policy favoring competition and the longstanding principle of federalism by affirming the holding of the court below.

SUMMARY OF ARGUMENT

This Court's decisions in the field of state action immunity fall along a continuum which reflects the sovereign status of the party whose conduct is challenged. In deter-

merce, Bureau of the Census, *Governmental Units in 1982*, 1982 Census of Governments, Preliminary Report No. 1 (June 1982).

mining the appropriate test for applying the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), to municipal conduct, the Court should recognize that the states often choose to implement policies which displace competition through their cities, counties, or towns. State law, to confer sufficient sovereignty upon a municipality, should authorize rather than compel the challenged conduct. The anticompetitive consequences of the authorized conduct should be a reasonably foreseeable consequence of the state's authorization. The Seventh Circuit properly employed these rules in finding that the respondent City of Eau Claire's conduct was protected by the *Parker* doctrine.

The court below was also correct in rejecting active state supervision of the municipality's conduct. Active supervision is a requirement imposed by the courts to ensure that a private party does not abuse its state authorization to displace competition. The active supervision requirement is inappropriate for municipalities because independent political constraints check the abuse of local power and because imposition of such a requirement would undermine the efficient operation of state and local government.

ARGUMENT

I. The Court Should Adopt A Municipal Action Test Consistent With The Federalism Rationale Of *Parker v. Brown*, Requiring Clear Authorization For The Challenged Conduct And Requiring That The Anticompetitive Consequences Of The Authorized Conduct Be Reasonably Foreseeable.

A. The State Action Doctrine Is Based On The Concept Of Federalism.

The state action doctrine evolved as a means of resolving the tension between the mandate of the Sherman Act and the power of the states to regulate commerce. As this Court

pointed out in the seminal state action case, the principle of federalism lies at the heart of the doctrine:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 350-51 (1943).³ See also *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 399-400 (1978) (discussing policy underlying *Parker*'s "implied exclusion" from the antitrust laws); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) ("immunity for state regulatory programs is grounded in our federal structure").

Notwithstanding the various labels applied to the *Parker* doctrine (exemption, immunity, implied exclusion, or preemption), it is clear that the doctrine has not afforded municipalities the protection it offers to states. In its first opportunity to address a claim of antitrust immunity by a city, the Court stated that extension of the *Parker* doctrine to municipalities would "be inconsistent" with the federalism rationale underlying *Parker*. *City of Lafayette*, 435 U.S.

³ *Parker* and its rationale have been reconsidered recently by commentators who point out that the case stands as an anomaly in light of this Court's cases construing the Supremacy Clause. See, e.g., M. Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 Hastings Con. L. Q. 255 (1983); G. Werden and T. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. Pitt. L. Rev. 1 (1982); S. Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 626-29 (1983). See also *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting).

389, 412. The Court went on to note that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.*

In *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982), *City of Lafayette*'s distinction between the sovereign status of state government and that of local government was reaffirmed. *City of Boulder* involved a Sherman Act attack on an emergency ordinance temporarily prohibiting an existing cable television franchisee from expanding its business into new areas of the city. The city relied upon the Colorado Home Rule Amendment, asserting that the constitutional grant of home rule power by the state was sufficient to elevate Boulder to "sovereign" status for purposes of applying the *Parker* doctrine. 455 U.S. at 52-53. The city's contention was rejected, and the Court reasserted its adherence to principles of federalism, of dual sovereignty, which cannot be shared by cities. *Id.* at 53-54.

This reasoning has obvious practical consequences. If a municipality is to shield itself from Sherman Act scrutiny, it must show that it wears the mantle of state sovereignty. The Court's state action cases have provided some guidance to lower courts examining a municipality's claim that it shares sovereignty, but have left significant questions unanswered.

B. *City Of Lafayette And City Of Boulder Suggest General Parameters, But Not A Complete Test, For Authorization Of Anticompetitive Municipal Conduct By The Sovereign.*

To date, the Court has decided nine cases which discuss the type of authorization necessary to shield governmental entities and private parties from antitrust attack.⁴ Two gen-

⁴ See *Parker v. Brown*, 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Canisus v. Detroit Edison Co.*, 428

era! rules have emerged with relative clarity. First, the state, acting legislatively through its legislature or supreme court is *ipso facto* exempt from operation of the antitrust laws. *Hoover v. Ronwin*, 104 S.Ct. 1989, 1995 (1984). See *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977); *Parker v. Brown*, 317 U.S. 341, 350 (1943). Second, private parties, because they possess no attributes of sovereignty, must satisfy a more stringent test. In *Midcal*, the Court stated a two-part test for identifying private conduct which is beyond the scope of the Sherman Act: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).⁸

It is clear that private conduct occupies one end of the "sovereignty continuum" and that legislative activity of a state occupies the other.⁹ Between the two ends of this continuum falls the conduct of local governmental units. In *City of Lafayette* and *City of Boulder*, the Court discussed the means by which local government may partake of state sovereignty for Sherman Act purposes.

City of Lafayette was the first and most cogent review

U.S. 579 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982); *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984).

⁸ The "active supervision" prong of the test is discussed below in Part II.

⁹ See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) cert. granted, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1922) (discussing state action decisions of this Court as falling along a continuum).

of the municipal branch of the *Parker* doctrine. Justice Brennan's plurality opinion accepts the postulate that state action is a doctrine based in federalism. *City of Lafayette*, 435 U.S. at 412-13. However, his opinion recognizes that local units of government may be "instrumentalities of the State for the convenient administration of government." *Id.* at 413. Justice Brennan concluded "that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*

City of Lafayette suggests the following parameters for determining whether municipal action reflects a state policy, to displace competition with regulation or monopoly public service: (1) the state must "authorize or direct" a municipality to engage in the challenged conduct, *Id.* at 414, (2) a "neutral" state policy toward the challenged conduct is insufficient to confer the necessary degree of sovereign power, *Id.*, (3) a political subdivision need not "be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit," *Id.* at 415, (4) an adequate state mandate for anticompetitive activities of cities may be found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.*⁷

Unfortunately, the Court was not required to apply these concepts rigorously in *City of Lafayette*. The city had argued that, by virtue of its mere status, it was protected from

⁷ In his concurrence, the Chief Justice accepted the general proposition that states may displace competition with regulation, but suggested two added requirements for municipal immunity: first, that the state compel the anticompetitive activity, and second, that the activity be essential to the state's regulatory plan. *City of Lafayette*, 435 U.S. at 425 n.6 (Burger, C.J., concurring).

the antitrust laws. *Id.* at 392. Because that threshold contention was rejected, the Court did not engage in close scrutiny of the relevant state statutes.

City of Boulder was a relatively simple application of *City of Lafayette*'s teachings, reiterating the admonition that mere state neutrality is insufficient to confer sovereign authority upon a unit of local government. The Colorado Home Rule Amendment at issue in *City of Boulder* transferred general authority to cities to operate autonomously. That transfer of power permitted cities to provide cable television in a number of ways, ranging from monopoly public service to free market competition. The city's ambivalent state law environment reflected Colorado's position of "precise neutrality" and Boulder's claim of immunity was rejected.

Perhaps the most noteworthy aspect of *City of Boulder* was the following language in the majority opinion:

The [*Lafayette*] opinion emphasized, however, that the State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the *Parker* doctrine would shield from antitrust liability municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.' 435 U.S., at 413. This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the 'state policy' relied upon would have to be 'clearly articulated and affirmatively expressed.' *Id.*, at 410. This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

City of Boulder, 455 U.S. at 51 (footnote omitted). A majority of the Court now agrees that the first prong of *Midcal* generally applies in determining when sovereign power has been passed to local government.

City of Lafayette and *City of Boulder* left two important questions unresolved: (1) how strong must the state's articulation of policy to displace competition be, *i.e.*, must it *compel* local conduct or merely *authorize* it? (2) how specifically must the state anticipate the anticompetitive consequences of the compelled or authorized conduct? The court below addressed these issues, resolving them within the boundaries defined by *City of Lafayette*.

C. *The Court Below Fashioned A Workable State Authorization Test For Municipal Activity.*

The Seventh Circuit held that state compulsion of a challenged municipal regulatory activity is not required to protect that conduct from Sherman Act scrutiny. The court's reasoning on this point is particularly cogent:

There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in *Goldfarb v. Virginia State Bar* [citation omitted] and *Cantor v. Detroit Edison Co.* [citation omitted], which appeared to require state compulsion as a prerequisite for municipal immunity. We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences

an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

700 F.2d 376, 381. *Accord*, *U.S. v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 473 (5th Cir. 1982) *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1922) (compulsion required for private conduct but not for conduct of a public official or institution).

Assuming that authorization rather than compulsion of the challenged conduct is sufficient to cloak a municipality with state sovereignty, how specifically must that authorization anticipate the anticompetitive consequences of the conduct? The court below, adopting *City of Lafayette's* common sense approach to the matter, stated: "if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the state contemplated that anticompetitive effects might result from conduct pursuant to that authorization." 700 F.2d at 381.

Relying upon Professor Areeda's analysis, Judge Wisdom wrote: "If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." *Id.* A similar test has been adopted recently by the Eighth Circuit which would find that "a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1012-13 (8th Cir. 1983). See P. Areeda, *Antitrust Law* ¶ 212.3a, at 53-54 (Supp. 1982); cf. *Hybud Equipment Corp. v. City*

of Akron, — F.2d —, 47 Antitrust and Trade Reg. Rep. (BNA) 419, 424-25 (8th Cir. August 24, 1984) (finding that regulatory power of city, in combination with authority of related state agency, reflected policy to displace competition).

The Seventh Circuit's treatment of these issues provides a principled means for accommodating the federalism rationale of *Parker* with the operational needs of local government. The states should not be required to transform units of local government into automatons in order to afford them reasonable protection from the antitrust laws. Obviously, the Wisconsin statutes reviewed by the court below indicated more than "mere neutrality" toward Eau Claire's decision to condition sewage treatment service upon annexation.* The petitioners labor mightily to obscure the plain import of the Wisconsin statutes which authorize the city's challenged conduct. Brief of Petitioners at 30-38. In reality, petitioners would require the State of Wisconsin to enact the "specific, detailed legislative authorization" eschewed in *City of Lafayette*.

Adoption of the petitioners' rule would lead to chaos in state legislatures throughout the country. Exaggerated fears of antitrust exposure triggered by the *City of Boulder* decision have already led municipalities to seek unnecessarily

* Wisconsin law contains a number of provisions granting localities the power to construct and operate sewage services. The court below focused on Wis. Stat. §§ 196.58(5) and 66.076(8). The Seventh Circuit was aided in its interpretation of these statutes by opinions of the Wisconsin Supreme Court construing the legislative purpose behind the sewage disposal scheme. In a prior state court antitrust action brought by the Town of Hallie, the Wisconsin Court noted that "the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area. . . ." 700 F.2d at 383, quoting *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321, 325 (1982).

detailed legislative authorization for numerous activities. *See, e.g.*, Va. Code § 15.1-23.1 (community antenna television systems); Md. Ann. Code Art. 23A § 3 (Supp. 1983) (power of municipal corporation to displace competition).⁹ The energies of municipal officials and state legislators should not be wasted upon the concoction of statutory formulas which serve the sole purpose of protecting cities from Sherman Act liability.

II. The Court Should Adopt A Municipal Action Test Which Recognizes The Practicalities Of State-Local Relations, And Reject The Active Supervision Requirement Which Has Been Applied To Private Conduct.

A. Private Conduct Requires Active Supervision By The State, To Check Abuses Of The Sovereign Power to Displace Competition.

When the anticompetitive conduct of a sovereign state is challenged, this Court has held that the state is immune from the Sherman Act by virtue of its status alone. *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). The anticompetitive conduct of a non-sovereign party, to be shielded from Sherman Act scrutiny, must be authorized by the sovereign by means of a clear articulation and affirmative expression of state policy to displace competition. With regard to private, non-governmental parties, an additional element is added to the test. The challenged conduct of a private party must be actively supervised by the state itself. *Midcal*, 445 U.S. at 105. This distinction between state conduct and private

⁹ The fear of antitrust exposure has also led municipalities to Congress, where they have sought legislation to establish a municipal antitrust exemption, or, alternatively, to limit the remedies available against municipalities. *See* Senate Committee on the Judiciary, *The Local Government Antitrust Act*, S. Rep. No. 593, 98th Cong., 2nd Sess. (1984) (background and analysis of S. 1578); House Committee on the Judiciary, *Local Government Antitrust Act of 1984*, H. Rep. No. 965, 98th Cong., 2nd Sess. (1984) (background and analysis of H.R. 6027).

conduct has been recognized in this Court's post-*Midcal* decisions. *See City of Boulder*, 455 U.S. at 51; *Hoover v. Ronwin*, 104 S.Ct. at 1995-96.

Once again the fundamental federalism rationale of *Parker* is reflected in the rule. The Sherman Act is a broad condemnation of restraints of trade which affect interstate commerce. Private parties, which are not entitled to the deference of states under our Constitution, should not be permitted to escape Sherman Act liability by interposing the existence of a one-time grant of state authority. In order to ensure that the state's policy to displace competition is carried out by the least intrusive means, the Court has required "pointed reexamination" of the authorized conduct of private parties. *Midcal*, 445 U.S. at 106 (state failure to monitor market conditions requires invalidation of price maintenance program). *See also New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (ongoing regulatory supervision cures "interim" restraints resulting from dealer objections to market entry by competitors). *See generally* 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213(a) (1978).

B. The Seventh Circuit Properly Rejected The Active Supervision Requirement For Municipal Conduct.

In *City of Boulder*, this Court reserved the question of the applicability of the "active supervision" requirement to municipal conduct. 455 U.S. at 51 n.14. The court below, along with other federal courts, has considered the "active supervision" requirement in cases alleging restraints of trade by municipalities. Overwhelmingly, the requirement has been rejected. In the case at bar the Seventh Circuit offered the following reasoning:

We do not conclude that *Midcal* requires active state supervision over the conduct in this case. The *Midcal*

case involved private parties that were given power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anti-competitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.

700 F.2d at 383-84 (footnotes omitted).

This distinction between the conduct of private entities and that of local government has been recognized by other circuits as an appropriate rationale for rejecting active supervision of authorized local activity. Independent political constraints not applicable to private conduct act as a check on local government's exercise of the power to displace competition. The Eighth Circuit notes that:

[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake. Because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context.

Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1014 (8th Cir. 1983). See also *Central*

Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419, 428 (8th Cir. 1983).

Imposition of an active supervision requirement for municipal action would impose a tremendous burden on state government. The Ninth Circuit, echoing an argument raised in Justice Rehnquist's *City of Boulder* dissent, notes the following:

A requirement of active state supervision would erode local autonomy. It makes little sense to require a state to invest its limited resources in supervisory functions that are best left to municipalities. As Justice Rehnquist observed, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the City itself." *Community Communications Co. v. City of Boulder*, 455 U.S. at 71, n.6, 102 S.Ct. at 851, n.6 (Rehnquist, J. dissenting).

Golden State Transit Corporation v. City of Los Angeles, 726 F.2d 1430, 1434 (9th Cir. 1984).

C. If This Court Determines That Active Supervision Is Appropriate For Some Categories Of Municipal Conduct, It Should Limit The Active Supervision Requirement To Local Functions Outside Of Traditional Health And Safety Areas.

In rejecting active state supervision of municipal conduct, the court below limited its holding:

We hold, therefore, that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity.

700 F.2d at 384 (footnote omitted). Judge Wisdom reserved the question "whether a municipality undertaking anticompetitive activity that falls outside the scope of a

traditional governmental function must be actively supervised by the state to receive *Parker v. Brown* immunity." *Id.* at 384 n.18.

In applying the *Parker* doctrine to Missouri's authorization of monopoly municipal ambulance service, the Eighth Circuit stated:

The provision of ambulance service by Kansas City is a traditional governmental function designed to protect public health and safety. See Note, The Supreme Court, 1981 Term, 96 Harv. L. Rev. 268-278 (1982). We need not address the question of whether municipal conduct which is outside the scope of such a traditional governmental function and which may pose a more significant threat to competition may require active state supervision to qualify for protection under the *Parker* doctrine. *Id.*

Gold Cross, 705 F.2d at 1014 n.13. See also *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 428 (8th Cir. 1983) (refuse disposal operations a traditional municipal activity requiring no active supervision).

This focus on traditional municipal activities echoes the Chief Justice's concurrence in *City of Lafayette*, which distinguished proprietary from governmental functions. Although the distinction has been criticized as unworkable, it may be operating *sub rosa* in a number of municipal state action decisions. The distinction persists because it responds to an intuitive notion that some functions are central to the public purposes served by local government while others are simply business enterprises conducted in competition with private entities.

Adoption of a traditional function test for active supervision, of course, would leave municipalities with the

nagging problem of determining what is "traditional." Traditional functions may vary locally or regionally, and traditions change. One leading commentator on municipal law points out that:

A municipal corporation is a public institution created to promote public, as distinguished from private, objects. . . . What is a public use or purpose has given rise to much judicial consideration, and courts, as a rule, have attempted no judicial definition of a public as distinguished from a private purpose but have left each case to be determined by its own peculiar circumstances. The modern trend of the decisions is to extend the class of public uses or purposes in considering the municipal activities sought to be included therein.

2 E. McQuillin, *The Law of Municipal Corporations*, § 10.31 at 819 (3rd ed. 1979).

Despite the difficulties of adopting a "traditional activity" test, the Court may be reluctant to jettison active supervision for all municipal activities. If so, the Court may properly find that the case at bar involves a traditional exercise of local power to protect public health and safety, and limit its holding to a rejection of active supervision for this type of function. The provision of sewage treatment services is within the police power of the state, acting through its local instrumentalities to protect public health. Moreover, sewage treatment is an area where underlying economic principles suggest declining costs per unit of output. Where this type of "public good" is involved, the Sherman Act's pro-competition policy is not strongly implicated, and the threshold for granting municipal immunity from the antitrust laws is appropriately relaxed. See P. Areeda, *Antitrust Analysis* ¶ 179 (3rd ed. 1981); see also J. Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 Tex. L. Rev. 481 (1982).

CONCLUSION

The Court should recognize the unique responsibilities and risks which attend the operation of local governmental bodies throughout the United States. Absent federal legislation establishing an antitrust exemption for units of local government, it is particularly important to establish rules guiding the day-to-day operation of these thousands of local entities. The court below properly considered the realities of government operation, and adopted a rule which gives appropriate weight to both the principle of federalism and the goals of the antitrust laws. For this reason, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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No. 82-1832

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IN THE
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OCTOBER TERM, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR,
TOWN OF UNION AND TOWN OF WASHINGTON,
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CITY OF EAU CLAIRE,
Respondent.

On Writ of Certiorari to the United States
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BRIEF OF U.S. CONFERENCE OF MAYORS,
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QUESTION PRESENTED

Are acts of governance of a local government, based on a state law delegating authority to provide a particular service to the public, subject to the Sherman Act under *Parker v. Brown* unless the local government's actions were specifically directed by the state on the basis of an affirmative state policy to displace competition or subject to active state supervision?

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INTERNATIONAL AND ASSOCIATION OF
METROPOLITAN SEWERAGE AGENCIES AS
AMICI CURIAE IN SUPPORT OF THE RESPONDENT

This brief is submitted on behalf of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the American Planning Association, the Government Finance Officers Association of the United States and Canada, the Airport Operators Council International, and the Association of Metropolitan Sewerage Agencies as *amici curiae*. Pursuant to Rule 36.2 of the rules of this Court, *amici* have obtained and filed the written consents of the parties to the filing of this brief. The *amici* support the position of the Respondent and urge that the Court affirm the decision below.

INTEREST OF THE AMICI CURIAE

The U.S. Conference of Mayors ("the Conference") is an Illinois not-for-profit corporation organized in 1933 made up of the Mayors of cities with populations of 30,000 or more. Mayors from more than 480 cities of the 800 cities eligible for membership in the Conference belong to the Conference.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state municipal league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC.

The National Association of Counties ("NACo") is the only national organization representing county government in the United States and includes rural, urban and suburban counties. NACo currently represents 1850 of the nation's 3106 counties and, through them, approximately ninety percent of the population of the United States.

The American Planning Association's ("APA") primary objective is to advance the art and science of planning in the overall development of the Nation and of its communities, cities, regions, and states. APA's 21,000 members include city, county, metropolitan, regional, and state planners, elected and appointed officials at all levels of government, professional practitioners, educators, interested citizens, and students.

The Government Finance Officers Association of the United States and Canada ("GFOA"), formerly the Municipal Finance Officers Association of the United States and Canada, is the professional association of governmental finance managers. GFOA's 9200 members are from city, county, state, provincial, and federal govern-

ments, school and other special districts, retirement systems, colleges, universities, public accounting firms, and financial institutions.

The Airport Operators Council International is the nonprofit corporation, established in 1948, that represents the governmental entities, primarily municipalities, counties, airport, and multipurpose transportation authorities, which own or operate the Nation's major airports served by the scheduled airlines.

The Association of Metropolitan Sewerage Agencies was formed in 1970 and is a nonprofit association representing 94 large metropolitan and municipal sewerage agencies. Its member agencies have responsibility for the management of the Nation's largest municipal waste treatment facilities which serve more than 73 million people.

The case before this Court involves the question of whether an act of governance by a local government is reviewable under the Sherman Act. The Court's answer to this question is of enormous consequence to local governments because it will have a direct bearing on their ability to govern and the structure of the governmental system.

The *amici* are participating in this case in order to provide the Court with an understanding of the functions of local government and the consequences which its decision will have for the existing system of governance. The *amici* are particularly interested in putting this purported antitrust case in the context of its potential impact on the existing system of governance.

The *amici* urge that, in the event the Court articulates standards in the context of this case under which the actions of local government could be subject to the antitrust laws, those standards should be clear and understandable, ensuring that local governments are not unnecessarily burdened by costly antitrust litigation with the

potential of bankrupting treble damage awards for inadvertent or unknowable violations of the antitrust laws.

STATEMENT OF THE CASE

The case before this Court stems from a dispute between the City of Eau Claire ("City") and four towns, the Towns of Hallie, Seymour, Union and Washington ("Towns"), all of which are located in the State of Wisconsin, over the provision of sewage service. The Towns allege that the City violated section 2 of the Sherman Act, 15 U.S.C. sec. 2, by refusing to provide the Towns with access to the City's municipally owned and operated sewage treatment facilities on terms that were acceptable to the Towns.

In the ordinary course of events, this intrastate dispute between state instrumentalities would be resolved at the state level through the state courts, the state legislature, the governor of the state or other cognizant state agency. However, the Towns have taken the extraordinary step of seeking mediation of this claim in the federal courts.

In order to obtain resolution of their claim in the federal courts, the Towns have fashioned an unusual and unconvincing interpretation of local government and its functions. The Towns characterize both the City and the Towns as entities which are engaged in commerce or trade (i.e., the sale of sewage service) for purposes of this case. The City's alleged violation of the Sherman Act is described by the Petitioners as using a monopoly over sewage treatment and disposal services in the relevant geographic market to gain a monopoly over the collection and transportation of sewage in that market to the detriment of the business interests of the Towns.

Specifically, the Towns contend that the actions of a local government, apparently including acts of governance by a local government, are subject to the federal antitrust laws unless the state has directed or authorized the anticompetitive conduct of the local government "which

necessarily follows from the State's policy" or, alternatively, the state actively supervises the actions of a local government in cases in which decision making authority has been delegated to the local government by the state. *Id.* at 40.

SUMMARY OF THE ARGUMENT

Prior to 1978, when the Court made its ruling in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), it would have been regarded as remarkable for any federal court to consider seriously the argument that the operation of a municipal sewage treatment plant by a city could be deemed to constitute the monopolization of trade or commerce among the states and, therefore, subject to review under the Sherman Act. It now appears, however, that *Lafayette* and its progeny, particularly *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), mandate an examination by the federal courts as to whether the operation of a municipal sewage treatment facility is compatible with the requirements of the federal antitrust laws.

In this case, the District Court and the Court of Appeals reviewed the recent judicial interpretations of the federal antitrust laws and rejected the claims of the Towns on the ground that the conduct in question falls within the state action exemption established by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent holdings. While this conclusion in itself appears to be a reasonable decision in light of the absence of clear guidance from the Court in this area, *amici* urge that the Court make clear that certain actions by local government are not cognizable under the federal antitrust laws.

The actions of the City in this case were acts of governance and did not involve the commerce or trade that is necessary for the federal antitrust laws to apply to a particular activity. The City was acting in its capacity as an instrumentality of the state, not on the basis of

commercial motivation. If the antitrust laws are to be applied to the acts of governance of local government, the effective operation of state and local government would be impaired and the Federal Government would become unduly and improperly involved in state and local matters.

ARGUMENT

I. ACTS OF GOVERNANCE UNDERTAKEN BY A LOCAL GOVERNMENT ON THE BASIS OF STATE LAW TO MAINTAIN PUBLIC ORDER OR TO PROMOTE THE COMMON WELFARE DO NOT PRESENT QUESTIONS THAT ARE PROPERLY SUBJECT TO ANTITRUST ANALYSIS.

A. Such Acts Of Governance By A Local Government Are Not Commercially Motivated And Therefore Should Not Be Reviewed Under Rules Designed To Encourage Competition In The Private Sector.

In *Lafayette* and *Boulder*, the Court ruled that the "state action" exemption established in *Parker* does not apply to local governments in the same manner as it does to states. However, the Court's determination that local governments are not *per se* immune or exempt from the antitrust laws does not preclude the Court from recognizing that acts of local government which are taken to implement public policy are fundamentally different from commercially motivated actions of private parties. The recognition of the proper role of local government under the federal antitrust laws is clearly within the purview of this case.

The Petitioners' assertion that the conduct of any "nonsovereign" should not be exempt from antitrust challenge unless the strict test for the state action exemption established in *Parker* and its progeny is met¹ should be rejected. There are fundamental differ-

¹ "First, the State must clearly and affirmatively adopt a policy to displace competition. . . . Second, the particular anticompetitive conduct must necessarily follow from the State's directive to implement that policy." *Brief for Petitioners*, at 14 (emphasis added).

ences between the actions of local government which are taken to implement public policy and the actions of private sector participants which are taken for private economic gain. While many activities of local government may have an impact on the economic position of private parties, they are not undertaken to further the economic interest of public officials, local government, or the electorate except in ways that are so remote as to be removed from commerce, and, therefore, should not be cognizable under the antitrust laws.²

The most troublesome question raised by *Lafayette* and *Boulder*, which the Court has yet to address, is whether local governments must base each of their activities on specific state authorizing legislation, including activities inextricably tied to the public welfare, to avoid scrutiny under the Sherman Act. In the absence of a clear answer to this question, local governments will be forced to go through costly and time consuming antitrust litigation simply to find out whether or not their actions are within the ambit of antitrust analysis. It has long been widely recognized and accepted that acts of governance and the acts of commercial entities are fundamentally different:

² See *Lafayette*, *supra*, "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U.S. at 418, n. 28. See generally Posner, "The Proper Relationship between State Regulation and the Federal Antitrust Laws," 49 N.Y.U.L. Rev. 693 at 705 (1974). See also *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. en banc 1984) (Higginbotham, J., concurring), "where . . . [the local government] acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business." 735 F.2d at 1571. "In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast the concept of 'profit' *per se* is alien to the purposes of a unit of government. Consequently, the clash of interests necessitating an antitrust law—the private desire to reap extra-normal profits versus the public interest in free competition—will not appear in its traditional form when the accused conspirator is a governmental entity." 735 F.2d at 1571-1572.

Local governments are established as political and governmental instrumentalities, not profit-making entities. . . . Early the Supreme Court took the position that the city is a public institution, created for public purposes only and hence has none of the peculiar qualities and characteristics of a trading company instituted for purposes of private gain, except, of course, that of acting in a corporate capacity. . . . [*Nashville v. Ray*, 86 U.S. 468, 475 (1873)]. The object of the city or town is governmental, not commercial. It is organized to make expenditures, not profits. Private gain, trading, speculation, or the derivation of pecuniary profit are not purposes or objects within the contemplation of the charter . . .

A city "is vitally a political power;" it is but "an affluence from the sovereignty" of the state, governs for the state, and its authorized legislation and local administration of law are legislation and administration by the state through the agency of the city. 1 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, sec. 1.57 at 81-82 (3d ed. 1971) (footnotes omitted).

Generally, local governments have responsibility for a wide range of subjects under state law, including matters of general concern such as public order and welfare; licensing; land development; streets and public ways; and the provision of public services, including sewage service, welfare, education, and transportation. 3 D. SANDS AND M. LIBONATI, *LOCAL GOVERNMENT LAW*, *passim* (1982). The amici urge that acts of governance³ which local governments must undertake in order to provide these services be recognized by the Court as not within the reach of the Sherman Act.

³ "Governance" is defined as "the act, manner, function or power of government." "Govern" is defined as "to exercise authority over; rule, administer, direct, control, manage, etc." and "implies the exercise of authority in controlling the actions of the members of a body politic and directing the affairs of state, and generally connotes as its purpose the maintenance of public order and the common welfare." WEBSTER'S NEW WORLD DICTIONARY at 604-605 (1966).

Acts of governance are, for the most part, simply not the types of activities that can be properly assessed under antitrust analysis. Government, including the Federal Government along with state and local governments is, for example, in the process of developing policies to deal with hazardous waste problems which accommodate both the public's interest in health and safety and the private sector's economic interests. The essence of governance is the pursuit of the public good. Under existing antitrust principles, however, the concept of the public good is not cognizable under the rule of reason analysis. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-692 (1978).

Acts of governance cannot be redefined to conform to the policies of the Sherman Act. It is difficult to cite cases in support of this proposition because the application of the antitrust laws to activities of a similarly non-commercial nature of other entities borders on the preposterous. For example, rival churches "compete" for members, but no one would argue that churches should be subject to the Sherman Act because of the existence of competition for membership.

Until *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975), the activities of professional associations were generally assumed to be noncommercial activities and therefore not subject to the antitrust laws.

[T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws. *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 654 (D.C.Cir. 1970) (footnotes omitted).

In *Marjorie Webster Jr. College*, the Court of Appeals found that, while it might be possible to conceive of com-

mercially motivated restrictions flowing from the accrediting of educational institutions, "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." 432 F.2d at 655.

If acts of governance which are designed to result in improvements in the community's public services were treated as commercial activities, then communities which choose to spend additional funds on public services might find themselves in antitrust imbroglios with neighboring communities that have chosen not to provide similar services. For example, communities surrounding a city may use the antitrust laws to gain access to a superior landfill site located in the city instead of taxing their own residents to construct and maintain landfill sites in their communities. Similarly, businesses may sue the local government because it is providing regulatory or tax incentives, or tax increment financing to competitors in furtherance of an important public goal, such as the redevelopment of a central business district. *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984).

Should the antitrust laws be a mechanism for guaranteeing uniformity of public services throughout the Nation, or should local governments be allowed to make taxing and spending decisions without the fear of antitrust challenge? If the antitrust laws apply to acts of governance of local governments, then the harsh economic choice facing local governments caused by potential liability under the antitrust laws will force them to forego innovative solutions to difficult problems. *Hybud Equipment Corp. v. City of Akron*, No. 83-3306, slip. op. (6th Cir. August 24, 1984); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983). Similarly, it will discourage local governments from investing scarce public resources to guarantee essential public services. *Scott v. City of Sioux City*, 736 F.2d at 1213; *Gold Cross Ambulance and Transfer and Standby Services, Inc. v. City of Kansas*

City, 705 F.2d 1005 (8th Cir. 1983). If the Court sanctions cases such as these under the antitrust laws, it will surely hasten the end of the participation of local governments in the state and local partnership as "laboratories" in the federal system trying "novel social and economic experiments without risk to the rest of the country." *New State Ice House Co. v. Liebmann*, 285 U.S. 262, 331 (1932) (Brandeis, J., dissenting).

This Court has recognized, "in the application of the Sherman Act . . . it is the nature of the restraint and its effect on interstate commerce and not the amount of commerce which are tests of violation." *Apex Hosiery v. Leader*, 310 U.S. 469, 485 (1940). Clearly local governmental actions to protect or advance the common welfare, while they may have the effect of restraining commerce or trade, are not restraints of a commercial nature or motivated by profit.

Antitrust analysis requires an assessment of the private economic or commercial motivations of activities undertaken in interstate commerce. Acts of governance by local governments, because they do not involve private economic or commercial motivations, cannot be fitted into a mold which is completely alien to their purpose.

B. Local Governments, As State Instrumentalities, Cannot Be Treated Like Private Enterprise Under The Sherman Act.

The parties to this lawsuit, the City and the Towns, are all instrumentalities of state government established under state law for the purpose of providing local self-government for their residents. The purpose of local government, while of a different scope, is generally similar to the purpose of other levels of government. Historically, governments were formed primarily for the purpose of performing functions for the common good. See Frug, G., "The City as a Legal Concept," 93 Harv.L.Rev. 1059, 1095-1099 (1980). In fact, government has developed as a result of a recognition that certain needs of society can most effectively be met on a collective basis.

The Nation's founders, in creating a strong federal system from a loose confederation of states, made a determination that certain functions were the responsibility of the national government. U.S. CONST. art. I. sec. 8. Similarly, states and local governments have assumed responsibility for certain functions which have gradually been defined (and continue to be further defined) through the political process as government's responsibilities. For example, at one time (i.e., during the Colonial Period, and in the early part of the Nineteenth Century in some cases) fire protection services were provided on a commercial basis by private entrepreneurs. To prevent economic—and sometimes physical—warfare among competing private concerns, local governments established local fire departments. These fire departments supplanted private enterprise as it was determined through the political process that service of an acceptable quality could be guaranteed for all residents of the community only by direct government involvement in the provision of fire protection services.

In countless other areas, governments have assumed responsibility for certain functions, providing services to the public which would otherwise not be provided or would not be available to all members of the public because of inefficiencies or diseconomies.

1. *The Provision Of Sewage Service Does Not Involve Commerce Or Trade; It Is An Act Of Self-government Undertaken By Local Government Acting As An Instrumentality Of The State.*

In this case, the City is the State of Wisconsin's instrumentality for providing local self-government under state law for its residents. The construction, maintenance and operation of a sewer system by a municipality is a typical example of local government actions which are undertaken to enhance the safety, welfare and convenience of the residents of a community. *New Orleans*

Gas Light Co. v. Drainage Commission, 197 U.S. 453 (1904).

The mere fact that a city's sewage treatment and disposal facilities may be supported by local taxes and/or user fees does not transform the government into an enterprise engaged in trade or commerce as the Petitioners have argued. A "city has no governmental obligation to provide for persons living outside its territorial boundaries." *Copper Country Mobile Home Park v. Globe*, 131 Ariz. 329, 641 P.2d 243 (Ct. App. 1982). The Petitioners' recourse should be through the political process, not the federal antitrust laws: "As we have stated . . . the remedy of the outside consumer . . . is an appeal to the political authority, such as the legislature or the voters of the state, or a refusal to accept the service on the terms offered by the city." *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210, 214 (1939). In the absence of a legislative mandate to provide sewage service, the municipality is the sole judge of the necessity of providing sewage service. 11 MCQUILLIN, *Op. cit.*, sec. 31.17 at 187.

The City's actions should be recognized as acts of governance which have none of the characteristics of trade or commerce and, therefore, should not be cognizable under the federal antitrust laws. The City is an instrumentality of the State of Wisconsin and any action legally performed under state law by the City is an act of governance under state law. The Wisconsin Supreme Court has already found that the City's actions were valid acts of governance under state law. *Town of Hallie v. Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). According to the court, "This service [the provision of sewage service] resembles other governmental services such as police and fire protection which are monopolies for the public good. *There is no profit motive involved.*" 314 N.W.2d at 326 (emphasis added).

II. THE APPLICATION OF THE ANTITRUST LAWS AS PROPOSED BY THE PETITIONERS TO ACTS OF GOVERNANCE BY LOCAL GOVERNMENT WOULD THREATEN THE EFFECTIVE OPERATION OF STATE AND LOCAL GOVERNMENT AND IMPROPERLY INJECT THE FEDERAL GOVERNMENT INTO STATE AND LOCAL RELATIONS.

A. Under The Interpretations Of *Lafayette* and *Boulder* Proposed By Petitioners, Almost Every Existing State Law Delegating Authority To Local Governments Would Fail To Withstand Scrutiny Under The Antitrust Laws.

The Petitioners argue for an application of the tests established in *Parker* and its progeny to acts of governance by local government that would effectively prohibit local governments from fulfilling the responsibilities delegated to them under state law. Specifically, the Petitioners argue that a state law which "reflects a state policy to leave questions of municipal sale of sewer services in general—and competition in particular—to the local municipalities" (*Brief for Petitioners*, at 33) does not meet the *Parker* test for exemption from the Sherman Act under the state action exemption. The Petitioners contend that "[t]o be exempt, the City must also establish that the State has directed the City to implement . . . policy [to displace competition with regulation] with the particular anticompetitive conduct in question." *Id.* at 24.

There is no question that Wisconsin municipalities have been delegated authority by state law to provide sewage service, including broad discretion to provide service outside corporate limits. WIS. STAT. sec. 66.076(1) (1981). In fact, under that law, a city "may construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the collection, transportation, storage, treatment, and disposal of sewage" (emphasis added). Thus, state law clearly contemplates the offering of sewage services as a complete package of services, including transportation and collection compo-

nents as well as the treatment component, in unincorporated areas.

The Wisconsin statute, like most state laws which delegate responsibility to local governments, was enacted in 1981, prior to the 1982 decision in *Boulder*. The facts of this case underscore the dilemma now facing state and local governments as a result of the Court's expansive interpretation of the *Parker* ruling in *Boulder*.

The powers of local government are derived from common law and state constitutions and statutes. The functions of local government have gradually evolved over the years as concepts of society's responsibilities for the common welfare have changed. Thus, most of the existing body of law—whether common law principles or specific provisions of a state statute or constitution—which delegates particular responsibilities to local governments was established prior to *Lafayette* and *Boulder* and, in some areas, prior to the *Parker* ruling or the enactment of the Sherman Act in 1890.

Consequently, there are virtually no state laws which would meet the test proposed by the Petitioners. Unless a state law was enacted subsequent to the *Boulder* ruling, the state legislature could not possibly have realized that its delegations would have to meet *Boulder* standards.

There should be a presumption that existing state laws delegating authority to local governments are valid. The Court's ruling in *Lafayette* and its progeny has effectively reversed that presumption. In *Lafayette*, reflecting concern for the rights of antitrust plaintiffs, this Court stated, "It fairly may be questioned whether [the plaintiff-corporation] ha[s] a meaningful chance of influencing the state legislature to outlaw on an *ad hoc* basis whatever anticompetitive practices [defendant-city] may direct against them from time to time." 435 U.S. 389, 406. *Lafayette* and *Boulder* have imposed a similar burden of far greater magnitude on local governments which are now apparently required to obtain explicit authorization

for any action they take that has anticompetitive consequences.

If this Court believes that "the economic choices made by public corporations . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . .," *Lafayette* at 403, then the Court also must recognize that it is no more likely that local governments have any more "meaningful chance of influencing state legislatures" to receive *Parker* protection than private parties have of receiving protection from the acts of local governments. This Court should be prepared to recognize that existing state authorizations which have "reasonable or foreseeable" anticompetitive consequences, when the local entity engages in the authorized activity, are sufficient for protection from antitrust liability under the state action exemption. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983). *Amici* contend that local governments should not be required to return to the state legislature for a new grant of authority, when they already have authority to act under state law, solely for the purpose of escaping antitrust scrutiny for engaging in acts of governance.

Acceptance of the Petitioners' assertions would mean that the existing body of law under which the powers of local government are defined and established would have to be almost completely rewritten in order to conform to the federal antitrust laws.

1. Local Governments Would Be Unable To Perform The Functions Which Have Been Assigned To Them Under Existing State Law.

Countless functions have been assigned to local governments under state law in areas such as land use planning, franchising, licensing, and the provision of public services. Local governments have been performing functions in these and other areas for decades and, in some cases, for centuries and even millenia. To allow for challenges to the validity of actions in these areas under the anti-

trust laws would seriously impede local government from taking action to protect the public interest. Hundreds of lawsuits involving antitrust challenges to acts of governance by local governments, such as zoning and waste disposal, have been filed since *Lafayette*, effectively jeopardizing the ability of cities and counties to govern.

If these activities can be challenged under the antitrust laws, then local governments will effectively be precluded from fulfilling their functions under state law. Moreover, there will be endless delay resulting from costly litigation while federal courts, sitting with exclusive Sherman Act jurisdiction, undertake an examination of state laws to infer or divine a legislative intent which could not possibly have existed at the time the legislation was adopted by the state.

2. State Governments Would Be Required To Assume Numerous Functions Which Are Presently the Responsibility Of Local Governments.

Under the test proposed by the Petitioners, state government would be required to assume authority or substantially intervene in areas which it has delegated to local government. In effect, the Petitioners are suggesting that the activities of local government should be subject to the strictures of the antitrust laws unless based on specific directives established by a state regulatory agency such as the Public Service Commission of Wisconsin. *Brief for Petitioners* at 31, n.17. The difficulty with creating state regulatory bodies to perform such oversight functions, in addition to the creation of another layer of bureaucracy between the citizens and their government, is that state regulatory bodies may be entitled to no more deference under the antitrust laws than are local governments.

"[I]n cases involving the anticompetitive activity of a sovereign *representative* [as distinct from the sovereign itself], the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed policy' to replace competition with regulation."

Hoover v. Ronwin, — U.S. —, 104 S.Ct. 1989, 1995 (1984) (emphasis added). Thus, as a result of *Hoover*, only the actions of the sovereign itself are clearly immune from antitrust scrutiny. In fact, the Court indicated in *Hoover* that the exemption established for the actions of the sovereign (e.g., actions of the court) will have little practical significance because the practice of law may be the only "trade or profession in which the licensing of its members is determined directly by the sovereign itself [the state supreme court] . . ." 104 S.Ct. at 2002, n.34. Thus, the actions of a state regulatory body, because they apparently are not likely to be classified as actions of the sovereign itself, may be entitled to no more deference than those of a local government.

The State of Wisconsin has, through its legislature, determined that the provision of sewage service should be a responsibility of local government. The assumption by a state of a particular function does not mean that it will be more or less anticompetitive than local government. A shift in responsibility from the local to the state level will not necessarily enhance competition; it will simply force the state to assume regulatory responsibilities which it has already determined are more appropriately handled at the local level.

The complete restructuring of the relationship between state and local government proposed by the Petitioners will not further competition, which is the purpose of the Sherman Act. In any case, there is no evidence that state bureaucracies are any less likely to pursue their own "parochial" interests, motives which this Court attributed to local government in *Lafayette*, 435 U.S. at 408, in establishing anticompetitive policies than a local government would be. *Hoover v. Ronwin*, *supra*. Moreover, the anomalous result of accepting the strict test for state authorizing legislation advocated by the Petitioners would be a lack of uniformity in the antitrust laws: local governments could be exempt from antitrust challenge in one state which has enacted legislation conforming to what-

ever standards for state action exemption the Court articulates in this case, while local governments could be subject to the antitrust laws in another state for identical conduct simply because of the absence of conforming state legislation.

B. The Petitioners' Interpretations Of *Lafayette* And *Boulder* Would Make The Allocation Of Governmental Responsibility Between State And Local Government A Matter Of Federal Law.

If the Petitioners' arguments are accepted, then a fundamental realignment of the intergovernmental system will be required. Specifically, any function which is currently delegated to local government under state law must either be assumed by the state through direct supervision or reauthorized and redelegated with specific directions conforming to this Court's decisions regarding the extent to which competition can be displaced by the actions of local government.

In effect, the federal antitrust laws could be used to require that the existing variegated system of state and local relations be replaced by a federally imposed uniform system for state delegation of authority to local governments. Under the test proposed by the Petitioners, every state in the nation would be required to adhere to a single system of delegating authority to local governments regardless of its own interest in structuring its governmental system in accordance with the state's particular needs. The Court's holding in the *Parker* case ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351) would be effectively overturned if the Petitioners' proposed test were adopted.

Under the Petitioners' proposed test, the power of the state to establish a governmental system in accordance

with its own needs, including a system under which certain functions are delegated to local government, would be eliminated. If Congress has the power under the federal antitrust laws to dictate how the states should delegate governmental authority to local governments, then the sovereignty of the states has no real meaning.

1. The Federal Courts Would Be Required To Determine The Validity Of State Delegations Of Authority To Local Governments On The Basis Of The Federal Antitrust Laws.

Under the Petitioners' analysis of *Parker*, *Lafayette*, and *Boulder*, the federal courts would be required to determine the validity of state laws which delegate authority to local governments. Under the proposed test, federal courts would not consider whether the conduct of the local government was valid under state law, but rather whether the state law conformed to some federal standard articulated by this Court for the proper delegation of authority under the federal antitrust laws. Thus, the actions of local government, even though permissible under state law, would effectively be prohibited under federal law and local governments would be unfairly penalized for state inaction.

In fact, the approach suggested by the Petitioners would establish a framework for assessing local conduct which makes no sense and will impose an extraordinary burden on the federal courts, potentially necessitating the review of virtually all state laws which delegate responsibilities to local government. The first question would be whether the actions of the local government are based on a state law which meets the strict standards for the state action exemption proposed by Petitioners. In the unlikely event that these standards are met, the antitrust action would be dismissed. If the state law fails to meet these standards, then the courts would then have to assess the conduct of the local government under the antitrust laws, either applying the existing body of law which precludes consideration of benefits to the public (*see National So-*

ciety of Professional Engineers v. United States, *supra*) making the validity of any governmental action which adversely affects competition questionable, or developing and applying a new and separate body of law for the assessment of actions by local governments.

2. In The Context Of The Unworkable Tests Which Have Been Established For Local Governments Under The Antitrust Laws, The Seventh Circuit Has Made A Reasonable Effort To Accommodate The Interests Of State And Local Government.

This Court has recently addressed the proper allocation of judicial authority between the federal and state courts for review of the actions of state and local officials. *See Parratt v. Taylor*, 451 U.S. 515 (1981); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982); *Pennhurst State School and Hospital v. Halderman*, — U.S. —, 104 S.Ct. 900 (1984); *Davis v. Sherer*, — U.S. —, 104 S.Ct. 3012 (1984). These cases, which recognize that a remedy must be available in some forum, including the federal forum for matters involving an overriding federal interest, for wrongdoings by state and local officials, generally reflect the common theme of respect for federalism and deference to state courts on matters of state law.

In this case, the Seventh Circuit has attempted to advance these policies by devising a test, which is workable under Wisconsin law, for the extension of the state action exemption to local government that will allow for early dismissal of antitrust actions. It is particularly important in Sherman Act cases that the rule under which motions to dismiss can be readily argued is sufficiently clear and workable in light of the exclusive jurisdiction provisions of the Sherman Act. 15 U.S.C. sec. 4. When it appears that there is no significant federal interest, or where there is sufficient authority for the action under state law, disputes such as the one in this case should be returned to the state forum for resolution.

In most cases, there will be adequate remedies available under state law. A fundamental difference between public and private antitrust defendants is that public defendants are subject to an array of legal requirements which ensure accountability. Most states have open meeting laws, such as sunshine laws and freedom of information laws which apply to local governments. Local governments generally must comply with strict bidding and procurement requirements established under state law. Most importantly, public officials, are ultimately accountable to the public through the electoral process.

There are a variety of federal laws in addition to the federal antitrust laws which provide significant protection against unfair actions by local government. Local governments are no strangers to litigation under the Civil Rights Act of 1871. 42 U.S.C. sec. 1983. In fact, many of the antitrust cases which have been brought against local governments include section 1983 claims, resulting in even more convoluted litigation. See *Golden State Transit Corp. v. City of Los Angeles*, 520 F. Supp. 191, reversed, 686 F.2d 758 (9th Cir. 1982), cert. denied, 103 S.Ct. 729 (1983), on remand, 563 F. Supp. 169, affirmed, 726 F.2d 1430 (9th Cir. 1984); *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (D.C. N.D. Ill. 1984).

In addition to the civil rights laws, other federal protections have been established which protect against transgressions by state and local officials. For example, the provisions of the Robinson-Patman Act, 15 U.S.C. secs. 13(a) and (f), have been applied to commercially motivated retail transactions by state and local government. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, — U.S. —, 103 S.Ct. 1011 (1983). Federal funds can be recovered from local government grantees when federal funds have been misspent. *Bell v. New Jersey*, — U.S. —, 103 S.Ct. 2187 (1983). The provisions of the federal bribery statute, 18 U.S.C. sec. 201, can be applied to local officials and their grantees.

Dixon v. United States, — U.S. —, 104 S.Ct. 1172 (1984).

The availability of numerous state and federal remedies, in combination with the fact that local officials are ultimately accountable through the ballot box to the public, argue for the establishment of a simplified rule for dismissal of antitrust actions such as that used by the Seventh Circuit.

C. Congress Does Not Have The Power Under The Commerce Clause To Abrogate The Sovereign Powers Of The States Under The Tenth Amendment.

1. The Allocation Of Governmental Authority To Its Instrumentalities By The State Is An Integral Function Of The States And Is Not A Function Which Congress Can Take Away From The States Under The Commerce Clause.

Under current law, states have broad latitude to create political subdivisions and to allocate governmental power to those subdivisions. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *Sailors v. Board of Education*, 387 U.S. 105, 108 (1967). This flexibility is essential in order to allow for experimentation in the allocation of governmental power within states. As this Court said in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), any other result

would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. A healthy regard for federalism and good government renders us reluctant to risk these results. 447 U.S. at 441.

The sovereignty which federalism guarantees state and local government would be subverted if the rigid constraints which Petitioners would impose on local governments in the name of *Parker*, *Lafayette*, and *Boulder* are not rejected. The Court's decision in *National League*

of *Cities v. Usery*, 426 U.S. 833 (1976) is of special significance in this context. In *Usery*, this Court held that Congress lacked the power to control the employment conditions of state and local governments through the Fair Labor Standards Act, noting that the Tenth Amendment prevents Congress from "exercising power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 845.

The Court in *Usery* was concerned that, regardless of whether the federal requirements were socially desirable, they might have the effect of "substantially restructur[ing the] traditional ways in which local governments have arranged their affairs." 426 U.S. at 849. For that reason, the Court concluded:

This exercise of congressional authority does not compare with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause]. 426 U.S. at 852.

The Court thus recognized that principles of federalism as well as the Tenth Amendment militate against imposition by Congress on state or local government of "its choice as to how essential decisions regarding the conduct of integral governmental functions are made." 426 U.S. at 855. Moreover, the opinion clearly states that there are limitations on Congress's powers under the Commerce Clause to intervene in local as well as state matters:

The local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if the services were provided by the State itself. 426 U.S. at 855, n.20.

The principles enunciated in *Usery* should apply with even greater force in this case. *Usery* involved federal regulation of public employee relations, a more limited federal involvement in the integral operations of state and local government than is contemplated in this case. In this case, the ruling requested by the Petitioners will mean, at a minimum, direct federal involvement in state and local relations, including the establishment of federal guidelines for the delegation of governmental authority to local governments.

III. RECENT EFFORTS BY CONGRESS TO ENACT LEGISLATION TO PROTECT LOCAL GOVERNMENT AND THEIR OFFICIALS FROM LIABILITY UNDER THE ANTITRUST LAWS REFLECT WIDESPREAD DISSATISFACTION WITH THE UNWORKABLE STANDARDS WHICH HAVE BEEN APPLIED TO STATE AND LOCAL GOVERNMENT UNDER THE ANTITRUST LAWS.

A. The Vague And Conflicting Standards Enunciated By The Courts Have Confounded Congress.

Recent efforts by Congress to enact legislation protecting local governments and their officials from antitrust liability reflect the widespread dissatisfaction with the standards which have been established by the Court regarding the state action exemption under the antitrust laws. In fact, when confronted with the confusing standards established by the Court, both bodies of Congress are moving rapidly towards elimination of the damages remedy in all antitrust lawsuits against local governments or local officials, an extraordinary action for Congress. These actions have generally been characterized as the necessary first step in providing relief for local government⁴ while Congress attempts to make sense out of the legal morass created by the Court's decisions.

The United States House of Representatives recently approved legislation which would exempt cities and city

⁴ S. REP. NO. 593, 98th Cong., 2d Sess. 3 (1984).

officials from monetary damages under the antitrust laws.⁵

The full Senate is expected to take up a bill which is similar to H.R. 6027 (S. 1578) in the near future. S. 1578, which has been reported by the Senate Judiciary Committee and is sponsored by Senator Strom Thurmond of South Carolina, Chairman of the Senate Judiciary Committee, would exempt local governments and their officials from damages under the antitrust laws and would provide a limited exemption from damages for the conduct of persons acting on the basis of local government regulation.

After analyzing the shortcomings of the various bills considered by the House Judiciary Committee which would have changed the substantive standards governing the application of the antitrust laws to local governments, the House committee report accompanying H.R. 6027 concluded that "the most balanced legislative response at this time would be to restrict private remedies to injunctive relief" because "such an approach avoids the conceptual difficulties of the state action doctrine in determining whether a damage remedy is available." H.R. REP. NO. 965, 98th Cong., 2d Sess. 18 (1984). The committee report expressed dissatisfaction with the uncertainty created in the law as a result of the Court's various pronouncements on the state action doctrine, stating:

The Supreme Court has been criticized—and perhaps rightly so—for not applying a consistent theory in the 'state action' cases . . . The two critical deci-

⁵ H.R. 6027, sponsored by Reps. Peter Rodino, Jr. of New Jersey, Hamilton Fish, Jr. of New York, Henry Hyde of Illinois, and Don Edwards of California, was approved by the House of Representatives on August 8, 1984 by a 414 to 5 vote. It would exempt cities and city officials from damages under the antitrust laws. The exemption would apply to "official conduct," defined as any "action or inaction" by a local government or an official, employee or agent of local government which "could reasonably have construed to be within the legislative, regulatory, executive, administrative, or judicial authority" of a local government. Sec. 2.

sions involving municipalities (*Lafayette* and *Boulder*) contain eight separate opinions by various combinations of Justices. The Court is open to criticism . . . for its failure to provide an analytical framework by which future state action cases can be predicted with reasonable certainty. The only certainty in the law (as a result of the *Boulder* decision) may be that a home-rule amendment to a state constitution is not sufficient in itself to immunize a municipality's actions in a wide variety of contexts. H.R. REP. NO. 965, 98th Cong., 2d Sess. 7 (1984) (footnotes omitted).

Furthermore, the committee noted, "[t]he underlying dilemma that may account in part for the Court's halting efforts to clear a path in this area is the inherent tension in accommodating the national policy favoring competition with the *presumptively valid functions of local government*." *Id.* at 7 (emphasis added). The committee report analyzed the various legislative approaches which had been considered by the committee in the 98th Congress and explained the deficiencies of each.

The first approach would have established a "legislative immunity for municipalities co-extensive with that of the States provided that the local conduct is 'valid under State law' or that 'authority is vested' by the State" ⁶ in the local government. Underscoring the uncertainty as to the present meaning of the state action exemption established in *Parker*, this approach was dismissed in the committee report as not adequate to solve the problems confronting local governments under the antitrust laws: "The difficulty with this proviso . . . is that it would have the unintended effect of leading legal analysis back to the *Boulder*-type test for the delegation of state antitrust immunity. It is precisely this test which has spawned the antitrust dilemma now faced by governments." H.R.

⁶ *Id.* at 13. See generally H.R. 2981, sponsored by Rep. Henry Hyde of Illinois; H.R. 3361, sponsored by Rep. Hamilton Fish, Jr. of New York; and H.R. 5573, sponsored by Rep. Bob Stump of Arizona.

REP. NO. 965, 98th Cong., 2d Sess. 14 (1984) The committee report emphasized the inadequacies of the substantive standards applied under the state action exemption, including the standards which apply to state government, which have been established by the Court in *Boulder* and other cases.

As to the core concept of these bills—that of providing local governments with the same immunity currently enjoyed by the States—such an approach may not sufficiently address the concerns of local governments. Local governments understandably object to the uncertainty and potential liability posed by *Boulder*, and some of these bills have proposed to put municipalities back in a pre-*Boulder* position by attempting to provide them with the same immunity currently enjoyed by the States. However, . . . *anti-trust jurisprudence as it applies to States and State agencies remains case-specific, highly uncertain and, in some areas, undefined.* Municipalities which fear a continuing increase in antitrust litigation should take note of the number of state action cases filed against State or State agencies since the ‘active supervision’ prong of the state action test was announced in *Midcal* [*California Retail Liquor Dealers Ass’n v. Midcal-Aluminum, Inc.*, 445 U.S. 97 (1980)].” H.R. REP. NO. 965, 98th Cong., 2d Sess. 14 (1984) (footnote omitted; emphasis added).

A second approach discussed in the committee report was the establishment of an immunity based on the nature of the local government’s activity (e.g., whether an action is sovereign or commercial in character). See H.R. 3688, sponsored by Rep. Don Edwards of California. This approach was dismissed as unworkable with the statement that “witnesses pointed to the interpretive difficulties that some courts have had in applying similar tests based upon the distinction between governmental and proprietary activities.” H.R. REP. NO. 965, 98th Cong., 2d Sess. 15 (1984) (footnote omitted).

A third approach considered by the committee would have involved the establishment of a “municipal rule of

reason” under which “a balancing of governmental and competitive factors . . . would occur at the outset of litigation.”⁷ In discussing this approach, the report stated:

The difficulty with this test is that it is unclear as to what kind of evidentiary showing would be required by the courts in sustaining a local government’s action as being reasonably undertaken. Whether such a showing could be made on the initial pleadings without extensive discovery is also uncertain. Moreover, to the extent that subject matter jurisdiction should, as a general proposition, be established by a court as expeditiously as possible, this may not always be possible in complex cases. H.R. REP. NO. 965, 98th Cong., 2d Sess. 17 (1984).

⁷ *Id.* at 17. See also H.R. 5992, sponsored by Rep. Peter Rodino of New Jersey.

CONCLUSION

The *amici* urge that the Court reject the rigid and unworkable tests proposed by the Petitioners for extension of the state action exemption to the actions of local government in this case. Because the test proposed by the Petitioners and the existing standards formulated by the Court in *Lafayette* and *Boulder* threaten the effective operation of state and local government and improperly inject the Federal Government into the relationship between state and local government, the Court should establish a standard which recognizes that acts of governance by local government, when the local government is not engaged in commerce or trade, are not cognizable under the antitrust laws.

For the foregoing reasons, *amici* request that the judgment of the Seventh Circuit be affirmed and clear standards be established under which acts of governance by a local government are not cognizable under the Sherman Act.

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No. 82-1832

In the Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, ET AL., PETITIONERS

v.

CITY OF EAU CLAIRE

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether the "state action" exemption to the Sherman Anti-Trust Act is unavailable to a municipality that acts in accordance with a state's specific statutory grant of authority to act in an allegedly anticompetitive manner.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

This case concerns the application to municipalities of the "state action" exemption to the federal antitrust laws, developed by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases. The United States has primary responsibility for enforcement of the antitrust laws. For that reason it has an interest in assuring that the state action doctrine is applied with proper regard for the principles of federalism on which it is based, viz., that conduct properly characterized as action of the state as sovereign is excluded from the coverage of the Sherman Anti-Trust Act (Sherman Act), 15 U.S.C. 1 *et seq.*, but that no other restraints of trade are held immune. Accordingly, the United States has participated in most of the cases in which this Court has considered issues regarding the state action doctrine.

STATEMENT

1. Petitioners are four Wisconsin townships adjacent to respondent, the City of Eau Claire, Wisconsin (City). Petitioners filed suit in the United States District Court for the Western District of Wisconsin against the City under the Sherman Act, 15 U.S.C. 1 *et seq.*, seeking only injunctive relief. They alleged that the City constructed (with federal funds) a sewage treatment facility that is the only such facility available to the surrounding area. They further claimed that they are potential competitors of the City in the collection and transportation of sewage, which are elements of sewage service distinct from sewage treatment. Finally, they assert that the City refused to provide sewage treatment services to sewage collected and transported by petitioners; instead, as the district court explained: "[t]he City has provided such services to individual land owners in the Towns if and only if the owners agree that the City will also provide sewage collection and transportation services by requiring annexation of the owner's land to the City" (J.A. 14). Petitioners alleged that the City was using its monopoly over sewage treatment to gain an unlawful monopoly over sewage collection and transportation. Petitioners also claimed that the City's requirement that consumers use the City's collection services in order to obtain treatment services from it was an unlawful tying arrangement and that the City's conduct amounted to an illegal refusal to deal with them. J.A. 13-23.¹

The district court dismissed petitioners' complaint (J.A. 13-22). Applying this Court's then-recent decision in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the court held that all of petitioners'

¹ Petitioners further alleged that the City's denial of sewage treatment services violated the Federal Water Pollution Control Act (the City used federal funds to construct its sewage treatment facility) and a state common law duty of a utility to provide service on a just and reasonable basis (J.A. 6-7).

Sherman Act claims were barred because the City's alleged conduct was protected state action. The court first found that Wisconsin's statutory scheme regulating municipal provision of sewage service clearly expressed a state policy to allow cities to refuse to provide such services unless the user agreed to become annexed to the city (J.A. 19-20). Thus, the court held that the State had displaced competition as the sole basis for deciding whether and how those services should be provided (*ibid.*). Second, the district court held that the State Department of Natural Resources (DNR) had authority to review municipal decisions concerning both the provision of sewage services and annexation and therefore the State provided adequate supervision of the City's actions as required by *City of Boulder* (J.A. 20).²

2. The court of appeals affirmed (J.A. 26-44). The court of appeals recognized that under this Court's decisions, "the *Parker* [state action] doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service" (J.A. 31; quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)). Applying this standard to the allegations of the complaint, the court of appeals held that the allegedly anticompetitive conduct was state action. J.A. 33-40. The court rejected petitioners' argument that the City's refusal to serve them was not state action because the City could not "point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation" (J.A. 33-34). Instead, the court

² The district court also held that the Federal Water Pollution Control Act does not provide a right to sue, that petitioners failed to pursue administrative remedies and that the Act provides no basis for the specific relief petitioners sought (J.A. 21). Having dismissed the federal claims, the district court dismissed for want of jurisdiction the pendant state law claim (J.A. 21-22).

concluded that "[i]f the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity" (J.A. 34-35). Thus, if the City showed that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services," then "we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization" (J.A. 34).³

Examining the relevant Wisconsin statutes, the court found that they authorize a municipality to set the geographic limits of its monopoly over sewage service (J.A. 37)⁴ and that the State had given the cities "authority * * * to insist on annexation as a condition to extending sewer services to the surrounding area" (J.A. 37).⁵ The court concluded that these statutes consti-

³ Relying on *Lafayette* and *Boulder*, the court of appeals rejected the notion that state compulsion is required to establish municipal immunity; as long as the state policy "evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition," it satisfies the articulation requirement (J.A. 35-36).

⁴ Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984) (emphasis omitted) (applicable to sewage systems under Wis. Stat. Ann. § 66.076(8) (West Supp. 1983-1984)) provides:

Notwithstanding s. 196.58(5), each village or city * * * may by ordinance fix the limits of [sewage] service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

⁵ Wis. Stat. Ann. § 144.07(1m) (West 1974) provides:

An order by the [state] department [of natural resources] for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or

tuted sufficient "evidence" of a state policy to allow the City to refuse to deal with petitioners and thereby acquire or maintain a monopoly over all facets of sewage service.

The court of appeals also found support for its conclusion that state policy authorizes the city to refuse sewage treatment services to unannexed areas in a decision of the Wisconsin Supreme Court, *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). The court of appeals noted that, in addressing a claim that a city's refusal to serve adjoining towns violated state antitrust laws, the Wisconsin Supreme Court had held that the Wisconsin legislature "viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area" (J.A. 39; quoting 105 Wis. 2d at 540-541, 314 N.W.2d at 325).

Having found that the City's conduct "was in a furtherance of clearly articulated and affirmatively expressed state policy" (J.A. 40), the court of appeals rejected petitioners' contention that this Court's decision in *California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), requires the state actively to supervise the City's conduct in order for it to be immune from the Sherman Act under the state action doctrine. The court of appeals distinguished *Midcal* on the ground that the conduct at issue there was viewed by this Court as "essentially a private price-fixing arrangement"

village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under S. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. In an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

(J.A. 40, quoting, 445 U.S. at 106). In contrast, since the present case involved "a local government performing a traditional municipal function," the court of appeals held that state "[s]upervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority" (J.A. 41).⁶ The court also concluded that imposing a supervision requirement on cities would be unsound policy, eroding the concept of local autonomy and home rule authority clearly expressed in the state's statutes. J.A. 42-43.

SUMMARY OF ARGUMENT

A.

1. Petitioners' contention that the City's refusal to provide them with sewage treatment services violated the Sherman Act rests on the erroneous premise that the state action doctrine treats municipalities and private persons in identical fashion. Congress intended the Sherman Act to be a broad prohibition on private restraints of trade; the Sherman Act was not intended to prohibit governmental action by the states as sovereigns that restrains competition, nor was it intended to impair the states' ability to rely on their officers and agents to carry out state policies in a manner that might restrain competition. *Parker v. Brown*, 317 U.S. 341 (1943). Accordingly, this Court has held that action of the state as sovereign is absolutely immune from the Sherman Act, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); action by private parties is protected only if it is compelled by the state, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); but action by municipalities is protected if it is contemplated by the state pursuant to a clearly articulated state policy to displace competition, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

⁶ The court of appeals reserved the question whether activity outside the scope of a traditional governmental function must be actively supervised. J.A. 43 n.18.

2. The difference between the standards for municipalities and private persons is not merely semantic; the special standard for municipalities is justified by the special relationship municipal governments have with the state and the importance of cities to the state's exercise of sovereignty. Unlike private parties, municipalities carry out state functions and often act as agents of the state in implementing state policy or providing public services. Although the Court concluded in *City of Lafayette* and *City of Boulder* that Congress did not intend to equate states and cities, whose wide-ranging activities could seriously impair Sherman Act values without carrying out state policy, it did not hold that the cities' role in our federal system of government is no different from that of private persons. When a city acts pursuant to a clearly expressed state policy to displace competition, it performs authorized governmental services on behalf of the state acting as sovereign. The Sherman Act was not intended to prohibit either the state's authorization of such conduct or the city's exercise of discretion in implementing the state's policy. Requiring states to anticipate and set forth detailed directions to the city concerning every potential anticompetitive purpose or effect contemplated by the state would unduly impair traditional state discretion to allocate governmental functions between the state and its instrumentalities, and this Court already has made clear that Congress did not so intend to undermine the state's relationship with its cities, *City of Boulder*; *City of Lafayette*.

3. Immunity for municipalities under the state action doctrine should exist whenever the city's action is contemplated by the state, pursuant to a clearly articulated state policy to displace competition; the state should not be required to supervise the city's activities. This Court has never held that municipalities, in contrast to private persons, must be supervised by the state in order to acquire immunity, *City of Boulder*, 455 U.S. at 51 n.14, and the courts of appeals generally have rejected any

requirement of state supervision for municipalities. See, e.g., *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1004 (8th Cir. 1983). Requiring a state to supervise its agents is by definition unnecessary to involve state agents in the decision-making and would not enhance any Sherman Act values since the state already must authorize and contemplate the municipality's anticompetitive actions.

B.

Here, the State has clearly articulated a policy to displace competition with respect to municipal provision of sewage services. Wisconsin grants to every municipality authority to set the limits of its sewage service (Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984)) and to refuse to provide services outside its limits unless the residents agree to be annexed to the City (Wis. Stat. Ann. § 144.07(1m) (West 1974)). The court of appeals interpreted these statutes as allowing cities to refuse to provide sewage service to areas refusing to be annexed. See *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). Under this interpretation, which is reasonable, the antitrust claims in petitioners' complaint are barred because the State has clearly articulated a policy to displace competition and has contemplated the conduct at issue.

Contrary to petitioners' contention, the Wisconsin statutory scheme does not express state "neutrality" toward the anticompetitive actions of the City as that term was used in *City of Boulder*. Unlike Boulder's, Eau Claire's actions were not merely undertaken pursuant to its home rule authority; instead, the state legislature specifically determined that a right to refuse to provide services except on condition of annexation should be delegated to a city in order to encourage broad provision of sewage services. This is not neutrality; it is precisely the type of authorization this Court required in *City of Boulder*.

ARGUMENT

BECAUSE THE CITY'S ALLEGEDLY ANTICOMPETITIVE CONDUCT WAS CONTEMPLATED BY THE STATE AS A MEANS OF IMPLEMENTING A CLEARLY ARTICULATED STATE POLICY, IT IS EXEMPT FROM THE SHERMAN ACT AS STATE ACTION

Both the district court and the court of appeals held that the State of Wisconsin's sewage services statutes constitute a "clearly articulated and affirmatively expressed state policy" and demonstrate that the State contemplated the City's allegedly anticompetitive acts, as required by this Court's decision in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982). Petitioners argue (Br. 14-29) that these holdings are incorrect, in effect, because the State did not compel the City to violate the law, or at least the City's acts were not "necessary" to comply with state law. In petitioners' view, compulsion is required in order to convert any "nonsovereign" activity—private or municipal—into protected state action. Petitioners' contention is contrary to this Court's decisions, which have made clear that the availability of immunity under the state action doctrine varies significantly depending on whether the action is that of the state or its instrumentality, or is merely that of a private person.⁷

⁷ The identity of the named defendant is not determinative; the crucial inquiry is whose action is at issue. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Hoover v. Ronwin*, No. 82-1474 (May 14, 1984), the Court found that the restraint at issue was imposed by the state supreme court although the bar (in *Bates*) and members of a committee of the court (in *Ronwin*) were named as defendants.

A. This Court's Decisions Clearly Establish That The State Action Immunity Doctrine Applies More Broadly To The Acts Of States And Their Instrumentalities Than To The Acts Of Private Persons

1. The antitrust state action doctrine was first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943); the Court observed that although the Sherman Act was intended by Congress as a broad prohibition on private restraints of trade, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. The Court found no congressional intent in enacting the Sherman Act to prohibit "state action or official action directed by the state" (*ibid.*). See also, *e.g.*, *Hoover v. Ronwin*, No. 82-1474 (May 14, 1984), slip op. 14 & n.24. Therefore, it concluded that because the state "as sovereign, imposed the restraint as an act of government" (*Parker*, 317 U.S. at 352) the state program at issue in *Parker* was not invalid under the Sherman Act.

In state action cases since *Parker*, the Court has focused on the fundamental question whether the particular restraint alleged is attributable to the state, and it has distinguished among (i) the ultimate state policy makers, (ii) private parties and (iii) subordinate units of state government. The basic protection for state legislative acts recognized in *Parker* has been extended to state supreme courts, at least where they regulate as the ultimate policy maker of the state.⁸ If the allegedly anticompetitive action is attributable to the state itself, the very fact that the state's legislature (or supreme court)

⁸ The Court has not determined "whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state action doctrine." *Hoover v. Ronwin*, slip op. 9 n.17.

has made the decision is alone sufficient to assure "that federal policy is [not] being unnecessarily and inappropriately subordinated to state policy." *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).⁹

2. In the case of purely private parties, this Court has imposed very strict requirements for attributing their conduct to the state as sovereign. This is because, as the Court emphasized in *Parker*, the Sherman Act was intended broadly "to suppress combinations to restrain competition * * * by individuals and corporations." 317 U.S. at 351. It is only when private parties are compelled by the state to act in an anticompetitive manner that their conduct can qualify for the immunity this Court has recognized for state-imposed restraints of trade.¹⁰ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-791 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976). However, since private persons are presumed to act in furtherance of their private interests, the state action doctrine does not protect state legislation

⁹ In *Bates v. State Bar of Arizona*, 433 U.S. at 359-360 (citation omitted); quoting *Goldfarb v. Virginia State Bar*, 421 U.S. at 791, the Court held that "the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules * * *. That court is the ultimate body wielding the State's power over the practice of law, * * * and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.'" Similarly, in *Hoover v. Ronwin*, *supra*, the Court held that the conduct at issue—approving a particular grading formula for the bar examination, and deciding how many applicants and which applicants would be admitted—"clearly was [action] of the Arizona Supreme Court." Slip op. 15. Because "the State itself ha[d] chosen to act" (*id.* at 14), the state action doctrine precluded application of the Sherman Act to that conduct. See also *Parker v. Brown*, 317 U.S. at 350 ("the legislative command of the state"); *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904).

¹⁰ We discuss this issue more fully in our brief in *Southern Motor Carriers Rate Conference, Inc. v. United States*, No. 82-1922. A copy of our brief in that case is being served on the parties in this case.

compelling their conduct unless the state also directly supervises the anticompetitive conduct. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980).

3. Contrary to petitioners' repeated assertions (Br. 17-21, 24-29), this Court has never held that cities are subject to the same rigorous standards as private persons for acquiring state action immunity from the Sherman Act. To the contrary, the Court has emphasized that, although a state cannot confer immunity from the Sherman Act on private parties "by authorizing them to violate it, or by declaring that their action is lawful" (*Parker*, 317 U.S. at 351), "'*Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws'" (*City of Boulder*, 455 U.S. at 57; quoting *City of Lafayette*, 435 U.S. at 417 (emphasis supplied)). This Court has thus explained that conduct of a municipality or a state agency may fairly be attributed to the state as sovereign if the subordinate unit is exercising power delegated to it in order to allow it to implement a clearly articulated state policy to displace competition with state control. See *City of Lafayette*, 435 U.S. at 410, 413; *City of Boulder*, 455 U.S. at 55. In such circumstances, the subordinate unit of government acts as the state's agent and may properly claim immunity. See *Hybud Equipment Corp. v. City of Akron*, No. 83-3306 (6th Cir. Aug. 24, 1984), slip op. 21; *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1012 n.11 (8th Cir. 1983).

Although the decisions of this Court in cases involving municipalities thus have clearly established standards for immunity allowing states to delegate discretion to municipalities but not to private parties, petitioners rely upon *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in arguing that the standards for both cities and private persons

are the same. *Midcal* was a suit seeking to enjoin enforcement of a state statute that mandated resale price maintenance by private liquor wholesalers. State compulsion was clearly present in *Midcal* as to the private parties who were required to comply with the statute. It was in that context that the Court stated in *Midcal* that the restraint on competition falls within the state action exemption only if it is "'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the state itself." *Id.* at 105; quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 398, 410 (1978) (opinion of Brennan, J.). The Court held that the state failed adequately to supervise the anticompetitive prices set by private entities and accordingly rejected the state action defense.

Petitioners attempt to bolster their argument with the following syllogism: In *Goldfarb* and *Cantor* this Court required compulsion for private conduct; *Midcal* involved private conduct; therefore the "clearly articulated policy" must mean "compulsion." We agree that in the context of private conduct, the "clearly articulated policy" and "compulsion" standards tend to meld. This is because, as we explain in our brief in *Southern Motor Carriers*, the *Parker* immunity doctrine must, as an implied exemption from the antitrust laws, be narrowly confined to its purpose of immunizing restraints of trade imposed by the states in the exercise of their governmental powers. Discretionary private conduct, therefore, cannot qualify. But, as we show, the Court has recognized that the states, for whom the immunity has principally been fashioned, do not have unitary governmental systems but, instead, have an important tradition of local self-government. The immunity, correspondingly, accommodates that tradition by extending to acts taken by local governmental units to implement clearly articulated state policies to displace competition, even if those acts are not compelled by the state. In the context of action by state instrumentalities, therefore, the "clearly articulated policy" standard significantly differs from "compulsion."

Accordingly, the Court has repeatedly reaffirmed the significant distinction, drawn in *Parker* itself, between private parties and officers or agents of a state. See, e.g., *Cantor*, 428 U.S. at 601 (opinion of Stevens, J.) (“*Parker* concerned only the legality of the conduct of the state officials.”); *Bates*, 433 U.S. at 361 (“*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.”); *City of Lafayette*, 435 U.S. at 411 n.40 (opinion of Brennan, J.) (“*Cantor*’s analysis is not necessarily applicable” to restraints imposed by a “State’s subdivisions” because *Cantor* involved “anticompetitive activity in which purely private parties engaged.”).¹¹

In addition, the Court has noted that although private parties are clearly subject to the treble damages provision in the Sherman Act, perhaps municipalities are not. *City of Lafayette*, 435 U.S. at 401-402; *City of Boulder*, 455 U.S. at 57 n.20. Also, the Court has suggested that perhaps the substantive standards for liability may be different for municipalities. *City of Lafayette*, 435 U.S. at 417 n.48; *City of Boulder*, 455 U.S. at 56-57 n.20.

B. The Standards This Court Has Adopted For Conferring State Action Immunity On Acts Of State Instrumentalities Are Consistent With The Federalism Principles Embodied In The State Action Doctrine

1. The difference in treatment between municipalities and private persons that this Court has recognized is

¹¹ Similarly, in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109-110 (1978), the Court held that the discretionary exercise of delegated authority by a subordinate state agency, pursuant to a “clearly articulated and affirmatively expressed” statutory system of regulation, is not subject to the Sherman Act. But the Court expressly distinguished such action by the state’s agents from private restraints authorized by the state, such as that held to violate the Sherman Act in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

fully justified by the very different relationship between cities and states compared to private persons and states. It is true that cities are not themselves “the State as sovereign,” and accordingly “for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.” *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 53-54. Cf. *Hans v. Louisiana*, 134 U.S. 1, 13, 16-17 (1890). But municipalities are created by the states in order to assist them in providing public services.¹²

Contrary to petitioners’ contention (Br. 25), this Court’s decision in *City of Boulder* did not declare that cities stand in the same shoes as private persons. Nor do they. What *City of Boulder* recognized was that the sheer number of municipalities and other state instrumentalities that may engage in anticompetitive activities creates a significantly greater risk to the Sherman Act’s pro-competitive values than that created by granting immunity to the states. This is particularly so where the city engages in proprietary activities. See *City of Lafayette*, 435 U.S. at 424-425 (Burger, C.J., concurring). Hence, the Court in *City of Boulder* held that Congress could not be presumed to have intended to allow state instrumentalities to act anticompetitively in pursuit of their own, rather than the state’s policies.

But the Court in *City of Boulder* expressly adopted the “clearly articulated state policy to displace competition” standard to balance the need to protect Sherman Act values while still preserving state flexibility to rely on their instrumentalities to implement state policy. Conduct of a municipality or a state agency may fairly be attributed to the state as a sovereign if the subordinate

¹² Similarly, unlike private parties, subordinate units of state government engage in “state action” as that term is used in other legal contexts, for example in applying the Fourteenth Amendment, and are for various legal purposes the agents of the state. See generally *National League of Cities v. Usery*, 426 U.S. 833, 846-848 (1976).

unit is exercising power delegated to it in order to allow it to implement a clearly articulated state policy to displace competition with state control. *City of Lafayette*, 435 U.S. at 410, 413; *City of Boulder*, 455 U.S. at 55. In such circumstances, the subordinate unit of government acts as the state's agent and therefore, in light of the Court's holding in *Parker* that Congress intended to preserve the states' governmental prerogatives, it is reasonable to infer that Congress did not intend to prohibit the municipality's efforts to perform governmental functions that are directed by the states.

Such a rule is crucial if states are to be able to provide services in a reasonably efficient manner. When a state decides to displace competition with a system of regulation designed to protect the public welfare, the legislature often, for practical reasons, must delegate power to subordinate agencies to carry out the state's policy. In order to assure that essential services are delivered to the residents of a state, such as sewage treatment, states are often obliged, or may properly prefer, to delegate to municipalities the primary responsibility for providing that service. Unlike private parties, municipalities that exercise such delegated authority are accountable to the ultimate state policy makers and to an electorate. Also, unlike private parties, cities have an obligation to act in the public interest.

In order to provide cities with enough financial incentive to undertake to provide certain governmental services, the state may also conclude that it is necessary to grant the municipality a measure of monopoly power with respect to the provision of those services. In so doing the state is exercising precisely the type of governmental authority that this Court held in *Parker v. Brown*, *supra*, that Congress intended to immunize from the Sherman Act. We see no basis for holding that the state's grant of authority to restrain competition in providing a discrete service is protected, but that the municipality's action, which is itself a form of govern-

mental action, taken pursuant to the grant of authority is not. Cf. *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

It certainly does not serve any interest in efficient state government to subject the state's governmental agent to potential federal antitrust liability for doing the state's bidding. And effective implementation of state policy often requires the states to give subordinate governmental units discretion in implementing state policies that have been expressed in relatively general terms or that depend on the implementing body's expert analyses of particular circumstances.¹³ *City of Lafayette*, 435 U.S. at 413; *City of Boulder*, 455 U.S. at 51. Thus, subjecting discretionary state agency conduct contemplated by the state to the kind of scrutiny proposed by petitioners would seriously interfere with the state's ability to "allocate governmental power between itself and its political subdivisions" (*City of Boulder*, 455 U.S. at 57; quoting *City of Lafayette*, 435 U.S. at 416) and thereby greatly encumber or totally frustrate implementation of state policy.

¹³ If the discretionary conduct of state instrumentalities were judged by ordinary Sherman Act standards, public interest factors would not be admissible to justify restraints on competition. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). This would effectively preclude the legislature from delegating to a subordinate unit functions requiring the exercise of discretion where, in the legislature's judgment, the public interest requires some deviation from the competitive market process. The Court in *City of Boulder* did not decide whether the *Professional Engineers* test would be applied to municipalities. See *Boulder*, 455 U.S. at 56 n.20; *id.* at 65-67 (Rehnquist, J., dissenting). On the other hand, expanding substantive antitrust analysis to allow courts to consider factors other than the competitive effects of a restraint imposed by a state agency acting in accordance with an articulated state policy would require an analysis bearing little resemblance to the substantive Sherman Act standards developed by this Court and lower courts over the years.

2. We recognize that there is some risk that a municipality or other state agency acting under a very broad grant of authority may, unlike the state legislature, respond only to a narrow segment of the public. *City of Lafayette*, 435 U.S. at 414; *City of Boulder*.¹⁴ But *City of Boulder*'s requirement of a clearly articulated state policy to displace competition and replace it with authorized municipal action adequately confines that risk. We do not believe that it is necessary, as petitioners argue (Br. 14-17), to require the state to compel the city's action in order for it to be immune from the Sherman Act, or that the City's action be "necessary" to accomplish the state's purpose. If the authority granted by the statute indicates that the legislature contemplated the type of anticompetitive conduct at issue, then it can be presumed that the legislature has considered the reasonably foreseeable consequences of the conduct and has determined that such an exercise of the agency's discretion will further the interests of the state as a whole. Certainly it would be inappropriate for federal courts in the context of antitrust litigation to examine the city's action any more intrusively; "[c]ourts * * * are ill equipped to determine in many cases whether a restraint was necessary." *Hybud Equipment Corp. v. City of Akron*, slip op. 20. Thus, subordinate agency action within the range contemplated by the legislature—even if it is not the only possible agency action—is properly deemed to be protected state action for Sherman Act purposes.

3. Petitioners argue (Br. 20) that even if a state does delegate power to a state instrumentality to take particular actions, such as refusing to deal with competitors who do not submit to annexation, this authority

¹⁴ This risk is significantly increased where a state agency is composed of members of a profession regulated by that agency and thus has an incentive to "foster anticompetitive practices for the benefit of its members." *Goldfarb v. Virginia State Bar*, 421 U.S. at 791.

does not evidence a clearly articulated state policy to displace all possible competition. In effect, they argue that state action immunity is available only if the state specifically expresses an intent to accomplish, or at least specifically refers to, the particular anticompetitive purpose or effect alleged in the antitrust complaint. Thus, in their view, the failure of the Wisconsin legislature to state expressly that the cities may employ the inherently anticompetitive power they received from the state to monopolize sewage collection and transportation service or to engage in arguably anticompetitive refusals to deal or tie-ins is fatal to the City's claim of immunity.

This argument defies common sense; no state legislature passes laws that detail all of the anticipated effects of the legislation. In interpreting state law, it is appropriate to assume that "a restraint which is expressly set forth in a legislative scheme for regulation is one that reflects a state policy to displace competition." *Hybud Equipment Corp. v. City of Akron*, slip op. 19. Refusing to recognize such a state policy would simply interfere with the state's ability to allocate responsibility between itself and its instrumentalities with no corresponding gain in Sherman Act values. See page 17, *supra*.

Indeed, this Court has specifically rejected attempts similar to petitioners' to confine unduly the state's authority to use its instrumentalities to serve the state's regulatory ends. In *City of Lafayette*, the Court disclaimed any intent to require states not only to authorize a subordinate agency's course of conduct, but also to anticipate and set forth in detail its policy concerning every potential anticompetitive purpose or effect that might be charged to an agency exercising the powers delegated to it. As the plurality opinion there stated, the state instrumentality need not necessarily be able to point to "specific, detailed" authorization; "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to oper-

ate in a particular area, that the legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415 (citation omitted).¹⁵

4. Finally, petitioners contend (Pet. Br. 38-42) that if the "clearly articulated state policy to displace competition" test is satisfied, even though the state does not compel the municipalities to take any particular action, then an additional requirement of state supervision of such instrumentalities should be imposed. In *City of Boulder*, this Court expressly reserved the question whether municipal action pursuant to clearly articulated and affirmatively expressed state policy also must satisfy the "active state supervision" test that the Court in *Midcal* applied to a private restraint compelled by the state. 445 U.S. at 51 n.14. We submit that the court of appeals was correct in refusing to impose a supervision requirement on traditional municipal conduct.¹⁶

¹⁵ Unlike a more precise grant of authority, a very general grant of authority, such as the home rule provision in *City of Boulder*, provides no basis for an inference that the state contemplated the restraint at issue and, thus, that in imposing it the subordinate agency is acting as the state's agent. It is not sufficient, therefore, that the state has given a subordinate agency general legislative authority (*City of Boulder*) or regulatory authority to implement a broad public interest standard (*ibid.*), or that it has articulated a policy to displace competition in some other area of an industry's activities (*Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)). Such sovereign "neutrality" concerning regulation of particular matters does not allow the subordinate unit's action to be attributed to the state.

¹⁶ The lower courts generally have declined to require active state supervision of the activities of municipalities and state agencies. See, e.g., *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d at 1014; *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 620 (6th Cir. 1982), cert. denied, No. 82-1067 (Feb. 22, 1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Hybud Equipment Corp. v. City of Akron*, *supra*; but see *Corey v. Look*, 641 F.2d 32, 36-37 (1st Cir. 1981).

State supervision of private conduct compelled by the state is necessary to insure that such conduct furthers state policy rather than remaining "essentially a private [restraint]." *Midcal*, 445 U.S. at 106. The Court in *Midcal* suggested that state supervision might have taken the form of "establish[ing] prices [or] review[ing] the reasonableness of price schedules; [or] regulat[ing] the terms of fair trade contracts * * * [or] monitor[ing] market conditions or engag[ing] in any pointed reexamination of the program." *Id.* at 105-106. Since the State took none of these steps—either directly or through subordinate regulatory agencies—it could not immunize private price-fixing from the Sherman Act even by compelling it.

Where the restraint at issue has been imposed by the action of a municipality or subordinate state agency, however, it is difficult to see how, as a practical matter, the state itself could supervise that restraint (other than through general legislative oversight or judicial review).¹⁷ The very examples given by the Court in *Midcal* show that the supervision requirement for private restraints can be satisfied by involvement of a subordinate state agency—which by definition already exists in the present category of cases, in the imposition of the restraint itself. Nor, contrary to petitioners' contention (Br. 40), is state supervision of the City's conduct necessary to insure that the state as sovereign has made a decision to displace competition.¹⁸ Once it is determined that the

¹⁷ In *Bates and Ronwin*, the Court found the state supreme court's supervision and ultimate control of actions of a particular type of state agency—a committee formed to assist the court in regulating the bar—sufficient to make the conduct at issue that of the state itself. But if the power to delegate authority is to have any meaning, a legislature cannot so extensively supervise and control all subordinate state agencies.

¹⁸ By contrast, there may be a need for "active supervision" where the subordinate state instrumentality is composed—as were

City's actions were expressly authorized and clearly contemplated by the state and thus reflected a prior decision of the state to displace competition, no subsequent review by the state is necessary to warrant attributing them to the state. See *City of Boulder*, 455 U.S. at 71 n.6 (Rehnquist, J., dissenting).¹⁹

C. The Courts Below Correctly Held That The City's Allegedly Anticompetitive Refusal To Provide Sewage Treatment Service To Areas Beyond Its Boundaries Unless The Residents Agreed To Annexation Was Contemplated By The State Of Wisconsin

1. Because the City is a subordinate state instrumentality, it is entitled, under the analysis suggested above, to state action immunity for conduct that is undertaken pursuant to a clearly articulated state policy to displace competition and substitute governmental control (see pages 12-14, *supra*). Although we do not profess to any particular expertise with respect to Wisconsin sewage

the committees in *Bates* and *Ronwin*—of members of the regulated business.

Although we do not believe that state supervision should be a necessary condition of the state action immunity in this case, we note that the district court found that there was adequate supervision available in the state scheme (see page 3, *supra*). If the Court were to hold that some supervision is necessary, that should not necessitate inquiring precisely into how that scheme operates and attempting to judge its efficacy. See *Hybud Equipment Corp. v. City of Akron*, slip op. 27-28.

¹⁹ Petitioners assert (Br. 25 n.15) that the Court's distinction between the states' agents and private persons is illogical because the effects of a municipal utility's anticompetitive conduct are not different from the effects of the same conduct by a private utility. This argument, however, ignores the basic premise of the state action doctrine: It is the source of the restraint on competition—and not its extent or effect—that determines whether the Sherman Act applies. The dual principles of federalism on which the state action doctrine is based require both (i) supremacy of the federal antitrust laws as applied to privately imposed restraints and (ii) latitude for the agents of the state to implement state governmental authority.

law, we submit that the courts below appear properly to have scrutinized the relevant statutes in finding that the anticompetitive conduct alleged in petitioners' complaint was specifically authorized and thus clearly contemplated by the State and, therefore, the complaint was properly dismissed.

Petitioners' complaint alleged that the City's refusal to provide sewage treatment services to petitioners, unless they would consent to annexation by the City, violated the Sherman Act. The Wisconsin legislature, however, clearly and expressly gave its municipalities, including the City, the authority to fix the limits of the areas within which they will provide sewage service and explicitly stated that they shall have no obligation to serve outside those areas. Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984) (see note 4, *supra*). Moreover, the state statutes indicate that the legislature took into account the possibility that state residents outside a municipality's boundaries would need service that only the municipality could furnish, and the legislature provided a set of governmental controls for dealing with that situation. The State Department of Natural Resources (DNR), after notice and hearing, may order a municipality to provide service outside its boundaries. Wis. Stat. Ann. § 144.07(1) (West 1974). A city, however, need not comply with an order by the DNR to provide service, unless the residents of the area to be served consent to annexation by the municipality. Wis. Stat. Ann. § 144.07(1m) (West 1974) (see note 5, *supra*).

In other words, the State of Wisconsin has articulated a policy of having governmental authority, rather than market forces, determine which governmental units will provide sewage service to particular areas within the State. It is obviously not practical, however, for the legislature itself to make the decisions as to exactly what areas each local sewage system should serve, and so the legislature has delegated that duty to the municipalities and the DNR. Moreover, the state statutes indicate that

the legislature contemplated that municipalities would be entitled to insist on annexation as a condition to provision of sewage service and that the legislature considered inclusion of an area in the general purpose governmental unit providing sewage service—i.e., annexation into the city—an appropriate condition for a city to impose when it is requested to furnish that traditional municipal service.²⁰

Therefore, as the courts below correctly held, in refusing to serve areas outside its boundaries, the City was acting in a manner contemplated by the State. Its action was in accordance with the State's policy determination that the interest of a municipality in requiring annexation of areas seeking the benefits of its sewage facilities outweighs the importance of increasing competition among potential vendors of municipal services by allowing areas outside a municipality to purchase particular services from a city without being annexed. Because the City was acting as an agent of the State in carrying out state policy, the actions at issue were state action and not subject to the Sherman Act.

Petitioners try to salvage at least some of their complaint by alleging that, even if the State contemplated some of the anticompetitive conduct of the City, the State did not necessarily approve all of its anticompeti-

²⁰ As the court of appeals noted (J.A. 39, quoting 105 Wis. 2d at 542, 314 N.W.2d at 326), the Wisconsin Supreme Court has concluded that allowing a city to insist on annexation of areas seeking its services

seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

This holding is consistent with general principles of municipal law. See 2 E. McQuillan, *The Law of Municipal Corporations* § 7.18a at 342 (3d rev. ed. 1979) ("it is customarily appropriate to annex territory for the extension of * * * sewers").

tive effects. But we find it difficult to avoid the conclusion that the State must have foreseen and approved the anticompetitive effects petitioners cite; otherwise the State's apparent policy to encourage the cities to provide sewage service more broadly would not work. If the City were required to allow petitioners to treat the sewage they collect from the towns and transport it to the treatment plant, then the unincorporated areas served by petitioners would have no incentive to be annexed into the City. Thus, if petitioners are granted the injunction they seek, the State's reconciliation of the possible conflicts between cities and unincorporated areas over the provision and financing of sewage services would be frustrated. This seems to us precisely the kind of intrusion into the state's effort to govern that the state action doctrine was designed to avoid.

2. Petitioners' argument (Br. 29-30) that the State is "neutral" within the meaning of *City of Boulder* with respect to the conduct at issue fails to distinguish between what the Court in *City of Boulder* characterized as state "neutrality"—the absence of any indication that the legislature contemplated the conduct at issue in that case—and the specificity with which the State of Wisconsin has delegated to its cities the particular authority exercised by the City in this case.

In *City of Boulder*, the conduct at issue was a city-imposed limitation on the expansion of petitioner's cable television business. The only authority relied on by Boulder to support its contention that its action was "in furtherance or implementation of clearly articulated and affirmatively expressed state policy" (455 U.S. at 52) was Colorado's Home Rule Amendment, which granted to home rule cities such as Boulder "the full right of self government in both local and municipal matters." Colo. Const. Art. XX, § 6; see *City of Boulder*, 455 U.S. at 43 & n.1. Applying the "clearly articulated and affirmatively expressed" state policy standard of *City of Lafayette* and *Midcal*, the Court concluded that where the state, through a broad grant of authority, "allows its municipalities to

do as they please," the state "can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." 455 U.S. at 55. The Court rejected as inconsistent with the federalism principles underlying *City of Lafayette*; *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. at 108-109, and *Midcal* the proposition "that [this] general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." 455 U.S. at 56. "Nor," the Court added, "can those actions be truly described as 'comprehended within the powers granted,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State." 455 U.S. at 55 (citation omitted).

The State of Wisconsin, on the other hand, has not simply "allow[ed] its municipalities to do as they please" by conferring general home rule authority on cities. It has granted the City home rule authority; but in addition, it has "affirmative[ly] address[ed]" the very conduct at issue in this case—the City's refusal to provide sewage service beyond its boundaries. The State has specifically authorized cities to determine the limits of their sewage service, and it has expressed its policy that a city not be required to extend this traditional municipal service to areas that do not consent to annexation. Moreover, the state has provided for "interaction of state and local regulation" (*City of Boulder*, 455 U.S. at 55) through orders of the state department of natural resources and the annexation process.²¹

In spite of the specificity of the State's conferral on municipalities of the right to require annexation as a

²¹ Petitioners ask (Br. 30-33) this Court to review de novo the holdings of the courts below that the statutory scheme constituted a clearly expressed intention to allow the conduct at issue. We have no reason to doubt that the district court and court of appeals correctly interpreted Wisconsin law; ordinarily this Court will not disturb the lower courts' construction of state law unless it appears to be clearly wrong. See *Cort v. Ash*, 422 U.S. 66, 73 n.6 (1975); *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534 (1949).

prerequisite to the provision of sewage services, petitioners argue that the State failed to articulate a policy to allow such refusals for the City's particular anticompetitive purposes. But since the action at issue was clearly authorized by the State, the court of appeals was correct in concluding that the legislature must have contemplated the anticompetitive effects that were plainly foreseeable in light of the power the State granted the City.²²

²² Congress currently is considering legislation that would prohibit recovery of antitrust damages against local governments and local government officials for their official conduct. (The legislation also would provide antitrust damage immunity for private conduct expressly required by a local government.) H.R. 6027, 98th Cong., 2d Sess. (1984) (see H.R. Rep. 98-965, 98th Cong., 2d Sess. (1984)) was passed by the House on August 8, 1984, and is now before the Senate. An amendment based on similar, but not identical, provisions of S. 1578, 98th Cong., 2d Sess. (1984) (see S. Rep. 98-593, 98th Cong., 2d Sess. (1984)) was passed by the Senate as part of an appropriations bill (H.R. 5712, 98th Cong., 2d Sess. (1984)), but the amendment was deleted from the bill in conference. Neither H.R. 6027 nor S. 1578, as reported, would alter the application of the antitrust laws to municipalities in actions for injunctive relief; the *Lafayette-Boulder* standards would continue to apply in such actions. See S. Rep. 98-593, *supra*, at 5; H.R. Rep. 98-965, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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IN THE
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OCTOBER TERM, 1984

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TOWN OF UNION and TOWN OF WASHINGTON, *Petitioners,*

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MEMPHIS, AND CHATTANOOGA IN
SUPPORT OF RESPONDENT**

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MEMPHIS, AND CHATTANOOGA IN
SUPPORT OF RESPONDENT**

INTERESTS OF THE AMICI

Letters from counsel for Petitioners and Respondent consenting to the filing of this brief are on file with the Clerk of the Court.

The American Public Power Association ("APPA") is a national service organization representing some 1,750 local, publicly-owned electric utilities throughout the United States. The public power systems represented by APPA vary in size from very large retail power suppliers such as the cities of Los Angeles, Seattle, and Memphis, to much smaller publicly-owned electric utilities serving the citizens of villages and towns. The publicly-owned utilities represented by APPA are operated on a non-profit basis for the benefit of their consumers-owners. Their purpose is not to enrich shareholders as with privately-owned utilities, but to make the advantages of public power broadly available at reasonable cost.

As in the case of other units of local government, publicly-owned power systems have observed with growing anxiety the explosion in antitrust litigation occasioned by *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, and its progeny. Officials of publicly-owned power systems are greatly concerned about the present uncertain state of the antitrust law as it applies to the operation of all aspects of local government. This uncertainty has threatened the ability of publicly-owned utilities to provide low-cost electric service and to respond to the demands of their citizens for new or expanded services.

Organized in 1912, the American Association of Port Authorities ("AAPA") is the Washington, D.C. based trade association which represents 76, virtually all, deep-draft port authorities in the United States and is their principal advocate on national issues. These ports are organized as public authorities by multi-state, state, or local government compact, legislative action, or charter and traditionally operate public facilities as government activities. AAPA members are concerned that expanding the scope of the antitrust laws to include port operations would impair their ability to provide services required for American economic and defense interests and to compete effectively in international trade.

The City of Cleveland, Ohio, the Michigan Cities of Detroit, Grand Rapids, Lansing and Traverse City, and the Tennessee Cities of Nashville, Memphis, and Chattanooga, join this brief because they believe that the application of the antitrust laws to them will impair their ability to take regulatory actions to promote the health, safety, and welfare of their citizens and to deliver needed services to their communities.

In their brief, *Amici* present authorities and arguments that support the adoption by this Court of a rule of law that will reduce the risk of antitrust liability faced by local government units. *Amici* believe that reduction both of the risk of antitrust liability and of the uncertainty inherent in the present unsettled condition of the law is essential to permit the effective and efficient operation of publicly-owned utilities and other local government units.

SUMMARY OF THE ARGUMENT

The *Amici* urge the Court to affirm the holding of the Seventh Circuit Court of Appeals. In addition, *Amici* urge the Court to take this opportunity to clarify the application of the state action doctrine to local governments by adopting a more flexible approach similar to that used by the Court of Appeals below.

Since the Court's decision in *Lafayette v. Louisiana Power and Light* six years ago, the exposure of local governments to federal antitrust liability has seriously impaired the ability of such governments to discharge their public duties. In many cases, local governments and their officials have been paralyzed by the fear that public and personal treasuries would be bankrupted by the litigation of antitrust actions and the payment of treble damages, if a plaintiff should prevail. This paralysis has been the result, in part, of the inability of local government officials to discern in the Court's opinions a reasonable basis upon which to predict the antitrust consequences of their actions.¹

As a result, the Court should hold that local government units are immune from antitrust liability when their actions affecting competition reasonably follow from authority granted by the State. State authority for a local government unit to act in a particular area affecting commerce should be deemed to constitute a clearly articulated and affirmatively expressed intention to displace competition within that area of commerce. Further, there should be no requirement of active state supervision of local government. Such a requirement would be redundant, because the State's normal political processes provide continuing oversight of local governments. A requirement for more intensive supervision would defeat the purpose of local government.

The promotion of "competition" by governmental units will not necessarily further the social or economic objectives of the Sherman Act. The legislative history of the Sherman Act evidences no intention to apply the Act's proscriptions to local

¹ See H.R. Rep. No. 965, 98th Cong., 2d Sess., 7 (1984)

government activities. Acceptance of the Petitioners' argument that state authorization must be so specific that local governments do not even have the discretion to decline to act would eviscerate local governments and destroy their effectiveness as a subordinate unit of state government. Adoption of such a rule would also interfere with important federal interests, including this Court's interest in permitting States broad latitude in ordering their affairs and those of their local governmental units.

ARGUMENT

I. THE THREAT OF BROAD ANTITRUST LIABILITY IS SERIOUSLY DISRUPTING THE EFFECTIVE AND ORDERLY ADMINISTRATION OF THE AFFAIRS OF LOCAL GOVERNMENT.

For 88 years prior to the Court's decision in *Lafayette*, it was generally assumed that the Sherman Act, 15 U.S.C. § 1, *et seq.*, (herein the "Sherman Act") had not been designed to constrain the activities of local government. Yet, in the six years since *Lafayette*, local government officials have seen that assumption overturned and three centuries of local government tradition, organization, and experience threatened.

The facts of this case illustrate the way in which the antitrust laws now threaten the erosion of historical local government roles. The Petitioners, four Wisconsin towns, have sought to bootstrap a political dispute into a claim under the antitrust laws. Amazingly, the Towns have alleged that the provision of local sanitary sewerage services to local residents is an activity involving trade or commerce under the Sherman Act. The Towns have further sought to characterize the City's management of a scarce public resource as the acquisition of "monopoly power in sewage treatment services with an intent to abuse that power" ² The characterization of the City's traditional public activity as being motivated only by the avarice of the private monopolist is ludicrous. Unfortunately, the Petition-

² Brief for Petitioners at 29.

ers' efforts are not unusual among those who seek to use the antitrust laws to intimidate local governments.³

Mr. Justice Stewart in his dissenting opinion in *Lafayette* aptly identified the variety of problems that would flow from the decision to extend the reach of the Sherman Act to local government. Mr. Justice Stewart pointed out that the plurality's opinion improperly characterized local governments as functionally equivalent to private commercial enterprises, improperly interfered with state sovereignty by limiting the ability of state governments to delegate authority to local government, and threatened both unnecessary judicial interference with affairs of local government and the imposition of huge costs on municipal governments and their citizens.⁴ The plurality dismissed Mr. Justice Stewart's dire predictions with the comment, "That, with respect, is simply hyperbole."⁵

With respect, Mr. Justice Stewart's predictions have become reality. Developers in Illinois have obtained a judgment of \$28.5 million dollars against the citizens of Grayslake and Lake County, Illinois, and several of their public officials.⁶ The *Grayslake* verdict is equal to 6,000 percent of the total property tax collected in 1983 by the Village of Grayslake and 150 percent of the property tax collected by Lake County.⁷

³ The Petitioner, Town of Hallie, brought this federal antitrust suit after it had lost a suit involving similar facts brought under state law. *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). After its unsuccessful effort under state law, the Town of Hallie turned to the federal antitrust laws, with their treble damage penalties, to resolve this intergovernmental policy dispute.

⁴ 435 U.S. 426-441.

⁵ 435 U.S. at 416.

⁶ *Unity Ventures, et al. v. County of Lake, et al.*, No. 81 C 2745 (N.D. Ill.) (hereinafter referred to as "*Grayslake*"). Post-trial motions are now pending.

⁷ Defendants' Memorandum in Support of Their Rule 50(b) and Rule 59(a) Motion, at 1, *Unity Ventures, et al. v. County of Lake, et al.*, No. 81 C 2745 (N.D. Ill.). As in the instant case, the *Grayslake* case involved a political dispute between local government units concerning strategies for develop-

In another case, the former mayor of Houston, acting in a politically expedient, but never allegedly corrupt, manner was subjected to personal liability for \$6.3 million in an antitrust suit arising out of his official action. The judgment was subsequently reversed, then reinstated on appeal, and, finally, reversed by the Fifth Circuit *en banc*, with the warning that the mayor's pre-*Lafayette* action justified a qualified immunity that will be available to no future public official.⁸

Other local governments have had to retreat from the exercise of their official governmental responsibilities in the face of antitrust lawsuits seeking huge damage awards. In Richmond, Virginia, city officials, faced with an antitrust claim in excess of their city's annual budget, abandoned efforts to promote urban redevelopment, made multi-million dollar payments to the antitrust plaintiff, and permitted the plaintiff, in effect, to plan a part of Richmond's downtown, an activity that the electorate thought they had delegated to city officials.⁹ City officials in Rancho Mirage, California, disavowed a voter-approved denial of zoning for a large hotel and residential development after being faced with a \$240 million antitrust lawsuit by the developers. The majority of the 7,000-person City had approved the denial of the zoning in a referendum, but City officials were forced to ignore the public will and approve the project out of fear that the City, with its \$4 million budget,

ment and allocation of the cost of sewerage facilities. The dispute arose when the Village of Round Lake Park granted the plaintiffs' request for high density zoning. Then, instead of choosing to use a sewerage system over which Round Lake Park had jurisdiction, the developers demanded that they be permitted to use a separate sewerage system over which the Village of Grayslake and Lake County had jurisdiction. Because of their different governmental policies, the Village of Grayslake and Lake County refused to permit the plaintiffs in the Village of Round Lake Park to shift to the defendants' taxpayers major costs associated with the plaintiffs' high-density development. *Id.* at 2. See also H. R. Rep. No. 965, 98th Cong., 2d Sess., 10, n. 14 (1984).

⁸ *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D. Tex. 1981), *rev'd*, 700 F.2d 226 (5th Cir. 1983), *on reh'g*, 735 F.2d 1555 (1984).

⁹ *Nat'l Journal*, June 18, 1983.

would be bankrupted.¹⁰ The mayor of Charleston, South Carolina, was forced to withdraw a transportation proposal designed to limit motor vehicle traffic in a renovated historical district after being faced with the threat of a lawsuit by a local transit company. The mayor explained that the proposal was being withdrawn to avoid expensive antitrust litigation.¹¹

Earlier this year, the Senate Judiciary Committee, in its report to accompany S. 1578,¹² concluded that antitrust liability for local government is having a destructive effect on the ability of local governments to function:

... Perhaps the most probative evidence of the effect of *Lafayette* and *Boulder* comes from local government officials themselves. Speaking on behalf of the National Association of Counties, the Honorable James C. Leventis, Chairman, Richland County Council, State of South Carolina, imparted to the Committee the urgency of the situation:

I am here to speak to you as one elected official to another, and to impart a very important message from local elected officials across the country. That message is simple. Local government officials can no longer effectively govern under the weight of the *Boulder* decision.

¹⁰ Associated Press, August 8, 1983, available on NEXIS, August 2, 1984.

¹¹ The New York Times, February 19, 1984 at 47, Col. 5.

¹² S. 1578 would limit private remedies against local governments to injunctive relief under Section 16 of the Clayton Act, removing any award of damages under Sections 4, 4A, and 4C of the Clayton Act. The Senate Judiciary Committee reported the bill favorably on June 15, 1984. The Committee noted that this "remedy" approach was the initial step in addressing the issue of local government antitrust immunity. The Committee also concluded that the "remedy" approach was necessary to "allow local governments to go about their daily functions without paralyzing fear of antitrust lawsuits . . ." The Judiciary Committee announced, however, that it would continue to study the broader issues of antitrust immunity for local governments. S. Rep. No. 593, 98th Cong., 2d Sess. 3 (1984). On August 8, 1984, the House of Representatives passed, by a vote of 414-5, H.R. 6027, which provides similar limitations on the remedies available against local governments and their officials. 130 Cong. Rec. 8622-24 (1984).

The Committee has concluded that these and numerous other expressions of concern are well-founded. It would appear that in many instances, the practical impact of *Boulder* and *Lafayette* has been to paralyze the decisionmaking functions of local government. The threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services. Furthermore, it would also appear that uncertainty of whether particular actions may be anticompetitive might have lead [sic] to the making of no decision at all, resulting in, for example, the inclusion of all bidders for a franchise, rather than choosing the most economical and efficient bidder. In either case, where a local government has avoided the issue or where it has simply allowed all comers to participate, the public interest may not have been well-served. In addition the Committee is concerned by delays in the decisionmaking process during the pendency of time-consuming and costly antitrust damage litigation.

S. Rep. No. 593, 98th Cong., 2d Sess., 3 (1984)

II. PETITIONERS MISUNDERSTAND THE NATURE OF LOCAL GOVERNMENTS AND THEIR RELATIONSHIPS WITH STATE GOVERNMENTS.

A. Local Governments Are Not the Equivalent of Private Businesses; Local Government Actions Are Taken to Promote the Health, Safety, and Well-Being of Their Citizens and Are Not Taken Primarily for Economic Reasons.

The Petitioners' position is grounded upon a fundamental error in analysis. They approach the interaction between the City and the several Towns as if these governmental units were economic actors who compete in the marketplace. The Towns speak of competition with the City "in the market for sewage collection and transportation services."¹³ The conduct of the City was ostensibly intended to "prevent the Towns from competing with the City in the sale of sewage collection

¹³ Brief for Petitioners at 4.

and transportation services within the Towns."¹⁴ A similar approach is taken by various of the *Amici*, notably the Town of St. Cloud, which describes as "illegal, anticompetitive conduct," an attempt by a city "to wield its monopoly control over waste water treatment services so as to force town residents and property owners to annex to the City."¹⁵

The application of marketplace analysis to the fundamentally governmental decisions in dispute in this litigation involves a misperception of the economic and governmental interests at stake. That such analysis can arguably find support in the language of this Court's decisions points to a striking need to restate the Court's position in this area so as to limit the impact of the Sherman Act to only those economic actors and decisions to which it was intended to apply.

Governments are not profit-maximizing units, but welfare-maximizing units: their purpose is to promote the welfare of their citizens. The maximization of this "public welfare" is seldom, if ever, the equivalent of the maximization of economic gain. For this reason, the application to governmental decisions of the antitrust laws does not necessarily further the laws' policies. As the Court has made clear, notably in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the antitrust laws are designed to minimize price and maximize output, for presumably this maximizes the economic benefit of the society as a whole. However, untrammelled competition tends to minimize price and maximize output in a market only if the participants in that market are profit-maximizing units. If the objective of the economic actors is not to maximize profits, then there is no reason to believe that competition between them would tend to produce any socially beneficial result.¹⁶

¹⁴ Brief for Petitioners at 12.

¹⁵ Brief for *Amicus Curiae* the Town of St. Cloud, Minnesota at 9.

¹⁶ See T. Calvani and J. Siegfried, *Economic Analysis and Antitrust Law* (1979), at 6-10, 13, 2^d 22, 46-49.

It is a commonplace that no market is perfectly competitive. However, certain kinds of market failures are more important in the context of government regulation or the provision by government of various services. Notable among these is the existence of externalities. An externality occurs when a cost imposed by, or a benefit conferred upon, an economic actor is not adequately taken into account by the price system in a nominally competitive market. A classic example is pollution. The cost imposed on society by pollution is not taken into account by the marketplace and, thus, a hypothetical polluting industrialist does not receive the price signals that would cause him to maximize welfare in an economically efficient manner. Governments at all levels have attempted to correct this particular market failure by enacting legislation and ordinances penalizing pollution, concluding that such regulation is the manner best calculated to demonstrate to the polluter the true cost of his conduct to society. By intervening in the marketplace in this fashion, the various governments involved are attempting to maximize welfare in a more intangible sense than that quantifiable in purely monetary terms.¹⁷

Economic action by governmental units is necessarily motivated by aims other than profit. The balancing of these inherently unquantifiable aspects of a community's welfare is quintessentially the function of government.

This dichotomy between the motivating forces behind private and public action is clear in this case. It is undisputed that both the Petitioners and the Respondent are authorized by the laws of the State of Wisconsin to install sewage collection and treatment facilities to serve their citizens.¹⁸ This authority was not granted to the Towns and the City in order to permit them to enter into commercial ventures for economic gain. Instead, this authority was granted in recognition of the desirability of local governments providing the essential public service of collecting and treating sewage to promote the health, safety,

¹⁷ See Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 Tex. L. Rev. 481, 490, et seq. (1982).

¹⁸ Wisconsin Stat. §§ 66.069, 66.076.

and well-being of their constituents. The manner in which sewage is collected and treated has obvious implications for the welfare and quality of life of a community, making it inappropriate to leave solely to individual choice.¹⁹ The existence of sewers is so vital to the health and welfare of a community that the power to construct them is frequently presumed, without express grant.²⁰ The claim that the Towns seek to provide sewage service to their citizens in order to reap a profit or gain a monopoly would be incredible, but that is what the Towns charge motivated the City. Certainly, the Towns sought to provide sewer service to their citizens for the same non-economic reasons as did the City: to promote the health, safety, and well-being of their citizens.

As McQuillin, in his treatise on municipal affairs, has stated:

It is elementary that all action on the part of the city or town must relate to public as distinguished from private affairs. That a city or town can exercise no other than public powers results from the fact that it is a public institution created and existing to serve the general interests of the people residing or coming within the city area, not as private individuals but as members of the political society.

1 E. McQuillin, *supra* note 19, at § 1.57.

The *Amici* urge the Court to recognize that local governments make decisions concerning regulatory action and the nature and scope of community services for essentially non-economic reasons. Local governments do not provide services to their citizens or make regulatory decisions to reap economic gain either for the governments themselves or for their citizens.

¹⁹ 11 E. McQuillin, *Municipal Corporations* § 31.10 (3d ed. 1971). "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." *New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905).

²⁰ 11 E. McQuillin, *supra* note 19, at §§ 31.10, 31.10(a).

... Early the Supreme Court took the position that the city is a public institution, created for public purposes only and hence has none of the peculiar qualities and characteristics of a trading company instituted for purposes of private gain, except, of course, that of acting in a corporate capacity. With emphasis this tribunal says: "Its objects, its responsibilities and its powers are different." Private corporations are the private property of the corporators. They are designed to regulate private interests and exist only for private gain. The object of the city or town is governmental, not commercial. It is organized to make expenditures, not profits. Private gain, trading, speculation, or the derivation of pecuniary profit are not purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage or advance such purposes further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government.

A city "is vitally a political power"; it is but "an affluence from the sovereignty" of the state, governs for the state, and its authorized legislation and local administration of law are legislation and administration by the state through the agency of the city.

1 E. McQuillin, *supra* note 19, at § 1.57 (footnotes omitted).

It is abundantly true, as noted by the Court in the *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 417 at n. 48 (1978) that: "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." They take on this different complexion because they are the product of a decision-making process motivated by concern over the health, safety, and well-being of citizens. The application to these decisions of an analytical framework developed to deal with the conduct of firms motivated by economic considerations is inappropriate, not the least because there is no theoretical basis to believe that it will result in a socially or economically beneficial result.

B. The Interpretation of the State Action Doctrine Advanced by the Petitioners Would Unreasonably Interfere With the Rights of States to Organize the Manner in Which They Provide Government Services to Their Citizens.

It apparently is the Petitioner's position that there can be no protection from antitrust liability unless a local government is completely bound by a rigid state mandate to follow only a single course of action. The Petitioners argue that state authority to displace competition is not sufficient if the question of "if, when, how, under what circumstances, or with what effects the authority is to be exercised" is left to the local government unit.²¹

This position grossly misstates the Court's formulation of the requirements for the extension of state action immunity to local government action. Many activities of local governments, and virtually all their regulatory actions, have some effect on competition.

Requiring an explicit state mandate for each individual local government action that might have an anticompetitive effect would eviscerate local government, shifting all decisions of any importance from the local to the state level. The diversity and flexibility of the state system has always been considered vital to the effective governance of the nation, and the political subdivisions of the States are necessary tools in the implementation of a federal system. It has always been supposed that not only the States, but also their political subdivisions, had vast leeway in the management of their internal affairs.²² Political subdivisions of States, such as counties and cities, are created as agencies for exercising such of the governmental powers of the States as might be entrusted to them. The number, nature, and duration of the powers conferred upon them, and the territory over which those powers shall be exercised, has

²¹ Brief for Petitioners at 40 (emphasis in original).

²² See *Sailors v. Board of Education*, 387 U.S. 105, 109 (1967).

always been supposed to rest in the absolute discretion of the States.²³

The federal Constitution does not impose on the States any particular plans for the distribution of governmental powers.²⁴ The principle advanced by the Petitioners would certainly interfere with the freedom of States, through their subordinate bodies, "to structure integral operations in areas of traditional governmental functions."²⁵ The refusal to permit the States to devolve authority to subordinate governmental units makes the States' residual sovereignty illusory.

One of the chief advantages of a decentralized system is the diversity that it permits, allowing experimentation in response to local problems.²⁶ The essence of federalism is the freedom of the States to develop a variety of solutions to problems so that they are not forced into common, uniform molds.²⁷ It has generally been assumed that States may properly determine that local governments are best able to assess the needs and desires of their communities and, therefore, can most wisely enact the legislation addressing local concerns.²⁸ The policy decisions that result, although made by a municipality, have typically been accorded great deference by the Court, even though important rights were implicated.²⁹ Surely it should be within the competence of States to determine that the local regulation

²³ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-179 (1907).

²⁴ See *Sweezy v. New Hampshire*, 354 U.S. 234, 255-257 (1957) (Frankfurter, J., concurring).

²⁵ *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). See also *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983).

²⁶ See *Sailors v. Board of Education*, 387 U.S. 105, 109-112 (1967). See also *Francis v. State of Maryland*, 605 F.2d 747 (4th Cir. 1979); *Avens v. Wright*, 320 F.Supp. 677 (W.D. Va. 1970).

²⁷ *Addington v. Texas*, 441 U.S. 418 (1979).

²⁸ *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), cert. den., ___ U.S. ___, 104 S.Ct. 194 (1983).

²⁹ *City of Memphis v. Greene*, 451 U.S. 100 (1981).

of a given economic activity, in accordance with a community's perception of local conditions, is the best allocation of authority. The ability to make such decisions is the essence of local autonomy.

The plurality opinion in *Lafayette* rejected the arguments that the Petitioners now make concerning the specificity of the state mandate required to permit local governments to avoid antitrust liability.

... This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate government unit's claim to a *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

435 U.S. at 415.

Neither *Boulder* nor any of the other cases decided subsequent to *Lafayette* supplemented the requirement of state authorization with one that the States mandate the activity in such specific terms that local governments would be subordinated to a purely ministerial role.

The approach advanced by the Petitioners has grave implications for the concept of federalism, for it would interfere with the ability of the various States to structure their governments as they see fit, and, in particular, to devolve decision-making power to subordinate governmental units. A federal system, with its concept of decentralized sovereignty, requires deference to the decisions of the various States concerning their manner of internal organization.³⁰

³⁰ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The Petitioners suggest that local governments could avoid the risk of antitrust liability by obtaining specific state legislation, accompanied by the creation of state offices to supervise the details of the local government action in question. It is politically and practically impossible to seek the State's formal blessing for each action that a local government might take that could conceivably have some effect on commerce. Among the chief attributes, and advantages, of local governments are their flexibility in the face of new and changing circumstances, and their responses to community concerns. If local authorities need seek specific state authorization and supervision before acting in any area touching upon commerce, the ramifications of which are perhaps not fully foreseen, the purpose of local government would be greatly limited, and local government units would become little more than investigative committees for state legislatures. Given that many state legislatures do not sit continuously, the ability of local government to respond to new developments or changing circumstances would be eliminated.

III. CONGRESS DID NOT INTEND FOR THE SHERMAN ACT TO APPLY TO ACTIONS OF LOCAL GOVERNMENTS AUTHORIZED BY STATE LAW.

The legislative history of the Sherman Act demonstrates that the Act was designed to control profit-motivated business combinations, exemplified by the monopolistic business trusts of the era. The legislative history amply shows that Congress understood and intended that non-commercial combinations undertaken to promote governmental purposes would not be within the proscriptions of the Sherman Act. The legislative history thus clearly supports an interpretation of the Sherman Act that protects from the Act's penalties local government units undertaking activities authorized by state law.³¹

³¹ In a number of other contexts, this Court has narrowed the scope of coverage of the Sherman Act. *E.g.* *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Eastern Railroad Pres. Conf. v. Noerr Motor Frgt. Inc.*, 365 U.S. 127 (1961). Refinement of the definition of the scope of the Sherman Act, especially when important

A. Congress Understood That the Reach of the Sherman Act Did Not Extend to Actions, Such as Those of Local Government, to Implement State Law.

The legislative history of the Sherman Act provides positive indication that Congress understood that local government activities authorized by state law would not be within the proscriptions of the Act. This evidence supports the conclusion that the Sherman Act should be held inapplicable to local government activities that are undertaken pursuant to state authority.

Following the introduction of S. 1 by Senator John Sherman on December 4, 1889,³² the Senate, sitting as a Committee of the Whole, undertook extensive debate on the form that the "trust bill" should take.³³ A number of amendments on a variety of subjects were offered to what had begun as a relatively succinct bill. The bill in its amended form was reprinted on March 18, March 25, and March 26, 1890, to include the various amendments.³⁴ By the time the bill was reprinted for the third time, the body had grown from three sections comprising some 39 lines of text to 16 sections comprising 309 lines of text.

state interests are involved, should be distinguished from the creation of an implied exemption to the Act. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60, *et seq.* (1982) (Rehnquist, J., dissenting).

³² S. 1, 51st Cong., 1st Sess., December 4, 1889, was identical to S. 3445, 50th Cong. 2d Sess., which was reported by the Committee on Finance on September 11, 1888. Both bills were titled, "A Bill to declare unlawful trusts and combinations in restraint of trade and production."

³³ S. 1 was referred to the Senate Finance Committee upon its introduction, 21 Cong. Rec. 96 (1890), from which it was reported on January 14, 1890, with minor amendments. 21 Cong. Rec. 541 (1890). The Senate's debate commenced February 27, 1890.

³⁴ Senator Sherman introduced a substitute bill as reported from the Senate Finance Committee on March 21, 1890, 21 Cong. Rec. 2455 (1890), to incorporate Committee amendments. The bill was reprinted on March 25, 1890, to incorporate amendments offered while the Senate was sitting as a Committee of the Whole on March 21, March 24, and March 25, 1890. 21 Cong. Rec. 2616 (1890). The bill was again printed the next day to incorporate further amendments offered during the final day in which the Senate considered the bill as a Committee of the Whole. 21 Cong. Rec. 2662 (1890).

Apparently because it had grown to such unmanageable proportions, the Senate interrupted its consideration of the various amendments and referred the bill to the Senate Judiciary Committee.³⁵ When it emerged from the Judiciary Committee, S.1 had been refashioned without the extensive amendments offered during the earlier debate.³⁶

Although S.1 was amended in a number of respects during its consideration by the Senate sitting as a Committee of the Whole, one amendment is of particular note. During the debate on March 26, 1890, Senator Wilson of Iowa offered an amendment that exempted from the coverage of the Sherman Act "any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers" Senator Wilson's amendment further stated "nor shall this act be held to control or abridge such powers of the States."³⁷ The amendment was adopted by the Senate sitting as a Committee of the Whole after the following debate:

[Mr. WILSON of Iowa]: I will state frankly my purpose in offering the amendment. Under the provisions of this section, should it become a law, every organization in such a State as Iowa, for instance, of the character of the Woman's Christian Temperance Union, the Temperance Alliance, and other organizations intended to promote the execution of the laws of that State in respect of the manufacture and sale of intoxicating liquors would become illegal bodies and their movements subject to the terms and provisions of this bill. I know that was not intended, and

³⁵ 21 Cong. Rec. 2731 (1890). The Senate sitting as a Committee of the Whole had rejected two earlier attempts to refer the bill to the Judiciary Committee, 21 Cong. Rec. 2610-11 (1890) and 21 Cong. Rec. 2660 (1890), and an attempt to refer it to the Finance Committee, 21 Cong. Rec. 2659-60 (1890). A third attempt to refer the bill to the Judiciary Committee had been withdrawn, 21 Cong. Rec. 2655-57 (1890).

³⁶ 21 Cong. Rec. 2901 (1890).

³⁷ 21 Cong. Rec. 2658 (1890). The amendment was to be added to Section 1 which had been separately amended to exclude workers and farmers from the Act's coverage. This amendment, which had been offered by Senator Sherman, "was evidently introduced to calm those who, unlike Sherman himself, feared that labor and farm organizations might be affected by the bill." H. Thorelli, *The Federal Antitrust Policy* 193 (1954).

yet the language, without being stripped of its power by the amendment I propose, would include all organizations of that kind. All I ask is that the subjects within the police power of the States as embraced within that legislation, of Iowa and any other State which may desire similar legislation, shall not be embraced within this provision, but that the States shall be left free in the execution of their police powers.

I will just add to what I have said that the proviso to which I offered this as an amendment excepts from the operations of this section of the bill arrangements, agreements, or combinations between laborers made with a view of lessening the number of hours of their labor or of increasing their wages, and it also excepts arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products. I think that the exception which I ask to have made by this amendment is quite as worthy of the support of the Senate as either of these.

Mr. HOAR. Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.

Mr. WILSON, of Iowa. My object is to exclude them from the operation of the bill.

Mr. HOAR. I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons he has described subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of the bill. It seems to me he should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether. This is what he means, and we would all vote for it.

Mr. WILSON, of Iowa. I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their States, they can move it.

Mr. HOAR. I move to amend the Senator's amendment by adding to it:

Or to discourage the use or manufacture of intoxicating liquors.

And we will take a vote on that.

...

The PRESIDING OFFICER. The question is on agreeing to the amendment to the amendment.

Mr. SHERMAN. The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized in something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the meaning of the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organizations in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would include temperance societies. You might as well include churches and Sunday schools.

...

The PRESIDING OFFICER. The question recurs on the amendment of the Senator from Massachusetts to the amendment of the Senator from Iowa.

Mr. HOAR. I will withdraw my amendment solely in the interest of saving time.

The PRESIDING OFFICER. The question then recurs on the amendment of the Senator from Iowa [Mr. Wilson].

The amendment was agreed to.

21 Cong. Rec. 2658-59, 2660 (1890).

As this debate indicates, Senator Sherman felt that the amendment was not necessary to exclude combinations undertaken to aid in the execution or enforcement of state or local laws from the Act's coverage.³⁰ Although the amendment was specifically offered to include temperance groups within its protection, Senator Wilson declined to narrow its coverage only to those groups, and a further amendment expressly identifying such groups was withdrawn.

Senator Wilson's amendment was adopted by the Senate sitting as a Committee of the Whole, but it was not adopted by the Senate in regular session, because the bill was referred to the Senate Judiciary Committee shortly before Senator Wilson's amendment was to be considered.³¹ The version of S. 1 that was subsequently reported by the Senate Judiciary Committee removed most of the amendments, including Senator Wilson's amendment. Also removed were amendments excluding from coverage such groups as farmers and laborers. It is reasonable to conclude that the Senate Judiciary Committee removed the Wilson amendment and the others because the Committee concluded that no express language was necessary to remove these types of activities from the coverage of the bill

³⁰ On two other occasions, Senator Sherman explained that his bill would not prohibit non-business combinations. In the first instance, he explained that S. 3445, which Senator Sherman had introduced in the previous session of Congress, would not have any effect upon voluntary community associations, such as temperance groups. 20 Cong. Rec. 1458 (1889). Subsequently, Senator Sherman rejected suggestions that S. 1 would prohibit combinations designed to promote interests of workers or farmers. "They are not business combinations." 21 Cong. Rec. 2562 (1890).

³¹ 21 Cong. Rec. 2731 (1890).

as reported.⁴⁰ Senator Wilson did not deem it necessary to offer his amendment again following the Judiciary Committee's report of the revised bill.

The adoption by the Senate, sitting as a Committee of the Whole, of Senator Wilson's amendment, and the subsequent conclusion that neither this amendment nor other expressed exceptions were necessary to prevent the unintended coverage of noncommercial activities, strongly support the conclusion that Congress did not intend the Sherman Act to proscribe activities of local government undertaken in accordance with state law.

B. Common Law Restrictions on Restraints of Trade and Monopolies Did Not Apply to Local Government Activities.

Senator Sherman made it clear that the Act bearing his name was intended to codify or adopt the common law rules applied by the courts of England and of the American States to trade restraints and monopolies.⁴¹ Representative Culberson, who was the floor manager of the bill in the House, explained the meaning of the term "monopoly" in the bill by adopting a definition equating the term with the common law concept of engrossing.⁴²

One searches in vain for any indication that the courts of England or of the American States ever applied common law

⁴⁰ This is the interpretation thought to be most plausible by Mr. Thorelli. H. Thorelli, *supra* n. 37, at 232. S. 1 as reported by the Senate Judiciary Committee on April 2, 1890, eventually became the Sherman Act.

⁴¹ 21 Cong. Rec. 2456, 2457 (1890). Senator Hoar, upon reporting S. 1 from the Judiciary Committee in the form eventually enacted, also indicated that the intent was to affirm the common law doctrines on these subjects. 21 Cong. Rec. 3146 (1890). See H. Thorelli, *supra* n. 37, at 181, 200, 201, 228.

⁴² 21 Cong. Rec. 4090 (1890). Engrossing was the purchase of goods at wholesale by those who resold them at wholesale. See H. Thorelli, *supra* n. 37, at 16. Senator Edmunds had previously adopted this definition in his comments in support of the version of S. 1 reported on April 8, 1890, by the Senate Judiciary Committee. 21 Cong. Rec. 3152 (1890).

rules on trade restraints to any local government units.⁴³ Surely, if Congress had intended such a marked departure from the common law conception of restraint of trade, there would have been some comment in the debate to that effect. The clear indication that the Sherman Act was intended to adopt and apply common law rules relating to trade restraints, together with the fact that such rules were never applied to local government units, offers compelling evidence that Congress did not intend that the Sherman Act apply to local government actions.

C. Local Government Activities Were Not Among the Evils Sought to be Addressed by Congress in the Passage of the Sherman Act.

The legislative history of the Sherman Act is filled with descriptions of the evil sought to be cured by Congress. In every case, the focus of the Congressional interest was the commercial restraint upon trade, the business monopoly, or the trust.

Prior to the introduction of the Sherman Act in the 50th Congress, the House passed a resolution authorizing its Committee on Manufactures to investigate trusts and other commercial combinations.⁴⁴ The Committee's report, submitted some six months later, focused on the sugar and Standard Oil trusts and presented in some detail the manner of those trusts' organization.⁴⁵ Subsequently, a number of bills were introduced, including S. 3445, which was introduced by Senator Sherman on August 14, 1888.⁴⁶ In the course of debate on S.

⁴³ An excellent review of common law rules in England and America relating to trade restrictions is presented in Mr. Thorelli's treatise. H. Thorelli, *supra* n. 37, at 9-107. Mr. Thorelli's survey does not identify any case in which common law restrictions on monopolies or trade restraints were applied to a local government unit.

⁴⁴ 19 Cong. Rec. 719 (1888).

⁴⁵ H.R. Rep. No. 3112, 50th Cong., 1st Sess. (1888).

⁴⁶ S. 3445 was not passed during the 50th Congress. It was reintroduced as S. 1 by Senator Sherman in the 51st Congress. S. 1 evolved into the Sherman Act.

3445, various Senators clearly indicated an intention that the bill would be addressed to commercial abuses of trade. Senator Jones of Arkansas expressed concern over the exercise of so broad a jurisdiction over commerce by Congress, but concluded that the exercise of such broad power was necessary, because "[t]he growth of these commercial monsters called trusts in the last few years has become appalling."⁴⁷ Senator Jones explained the evils caused by trusts that he sought to address:

Now, however, having been allowed to grow and fatten upon the public, their success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

20 Cong. Rec. 1457 (1889).

Following the introduction of S. 1 in the 51st Congress, Senator Sherman explained the public concern that motivated congressional attention to the trust problem:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 Cong. Rec. 2460 (1890).

⁴⁷ 20 Cong. Rec. 1457 (1889).

Senator Sherman subsequently quoted with approval Senator George's statement of the problem before Congress:

"These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the costs of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, until they are fast producing that condition in our people in which the great mass of them are the servitors of those, who have this aggregated wealth at their command."

21 Cong. Rec. 2461 (1890).

Throughout the debates, each Senator or Representative who described the problem sought to be remedied by the antitrust legislation that was to become the Sherman Act clearly stated that it was commercial monopolies and commercial trusts that would be restrained. None stated that the object of the bill was to in any way restrain the actions of local government units as authorized by state law.⁴⁸

⁴⁸ See also Comments of Senator George, 21 Cong. Rec. 2597-98 (1890); Comments of Senator Hoar, 21 Cong. Rec. 2728 (1890) ("When . . . we are dealing with . . . the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community."); Comments of Representative Wilson, 21 Cong. Rec. 4092 (1890) (description of operation of trusts); Comments of Representative Heard, 21 Cong. Rec. 4101 (1890); Comments of Representative Taylor, 21 Cong. Rec. 4098 (1890).

D. Congress Did Not Intend to Displace State Control of Local Government Activities that Affect Competition.

In adopting the Sherman Act, Congress intended only to apply its federally-stated policy in the realm of interstate commerce, which could not be controlled effectively by the several States. As Senator Sherman explained following the introduction in the 51st Congress of his bill to control restraints of trade:

Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State, but if the Senator from Mississippi can make this clearer any proposition he will make to that effect will certainly be accepted and I will cheerfully vote for his proposition.

21 Cong. Rec. 2460 (1890).⁴⁹

As Senator Sherman's remarks indicate, Congress in 1890 believed that its jurisdiction over interstate commerce was narrower than has been held by subsequent cases.⁵⁰ Nevertheless, Congress clearly understood that it was not acting to interfere with efforts of the States to control restraints of trade occurring within their borders. For example, Senator Sherman explained that, "[e]ach State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with."⁵¹ The Senator's intention was mirrored by the report of the House Judiciary Committee which favorably recommended the passage of the Sherman Act:

No attempt is made to invade the legislative authority of the several States or to even occupy doubtful grounds. No system of laws can be devised by Congress alone which

⁴⁹ Senator Sherman referred to Senator George of Mississippi, who had questioned the constitutionality of S. 1. See 21 Cong. Rec. 1765-1772 (1890).

⁵⁰ See, e.g., *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976).

⁵¹ 21 Cong. Rec. 2456 (1890).

would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. . . .

It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.

H.R. Rep. 1707, 51st Cong., 1st Sess., 1 (1890).⁵²

IV. THE PROPER CONSTRUCTION OF THE SHERMAN ACT SHOULD RECOGNIZE THE REALITIES OF STATE AND LOCAL RELATIONSHIPS AND THE CHARACTER OF LOCAL GOVERNMENT DECISION-MAKING.

The *Amici* ask only that the Sherman Act be interpreted in a manner consistent with the intent of Congress in enacting the legislation. Then, as now, local governments sought to promote the welfare of their citizens through appropriate regulation and through the provision of necessary government services. Then, as now, local governments sought to respond effectively and promptly to the needs of their citizens. This activity by local governments, with its undeniable effect on commerce, was taken as given by the Congress in 1890, so much so that it did not even prompt debate. In the more than 80 years between the enactment of the Sherman Act and the Court's opinion in *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978), it was assumed that the Sherman Act did not apply to the activities of local governments, and Congress took no action to extend the Act's coverage. During this time, local governments continued to do what local governments are sup-

⁵² See, e.g., comments of Representative Taylor: "This monster robs the farmer on the one hand and the consumer on the other. This bill proposes to destroy such monopolies, such destructive tyrants, and goes as far in that direction as Congress has the power to go under the Constitution. Our action must be supplemented by action of the States, for we can only deal with interstate transactions." 21 Cong. Rec. 4098 (1890).

posed to do: They responded to changing conditions and the changing needs of their citizens; they sought to promote the general welfare by providing services commonplace at the time of the Sherman Act's passage and by responding to their citizens' demands for new services in the intervening years.

It is the responsibility of state and local governments to promote the health, safety, and well-being of their citizens. These governments accomplish this task by using methods determined to be appropriate by government officials who are informed and constrained by the democratic process. The States, initially, must create, and establish the purpose for, local government units, and they express their judgments by a grant of power to local government units to fulfill those purposes. When the States issue broad grants of local government authority to deal with particular issues, the States have determined that the health, safety, and well-being of their citizens can best be protected by actions undertaken at the local level.

Local government units should be immune from antitrust liability when their actions affecting competition reasonably follow from authority granted to the local government units by the States. In particular, the Court should hold that state authority for a local government unit to act in a particular area affecting commerce should be deemed to constitute a clearly articulated and affirmatively expressed intention to displace competition, as that test has been articulated in prior decisions of this Court. There should be no requirement of active state supervision of these actions of the local government, for such a requirement would be redundant and would defeat the purpose of local government.

The Court must recognize that local governments act for public reasons, not for economic ones. The exclusive goal of local government is not and should not be economic efficiency. The very existence of government is a recognition that individual action, unconstrained, does not produce a workable society. Local governments smooth the rough edges of society closest to the individual. An appreciation of this role of local government is sorely lacking in the interpretation of the Sher-

man Act advanced by the Petitioners, and, unfortunately, in several of the opinions of this Court.

The *Amici* submit that their suggested approach strikes the proper balance between the interests promoted by the Sherman Act and the need of local governments to protect and serve their citizens. It is a balance that was established by Congress in its passage of the Sherman Act and was only of late upset. It is a balance that should be restored by this Court.

CONCLUSION

Amici Curiae, the American Public Power Association, the American Association of Port Authorities, the City of Cleveland, Ohio, the Michigan Cities of Detroit, Grand Rapids, Lansing, and Traverse City, and the Tennessee Cities of Nashville, Memphis, and Chattanooga join Respondent, the City of Eau Claire, in requesting that the judgment of the Court of Appeals be affirmed.

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IN THE
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OCTOBER TERM, 1984

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Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

**BRIEF OF THE AMICI STATES OF THE SEVENTH
CIRCUIT, ILLINOIS, INDIANA AND
WISCONSIN, IN SUPPORT OF RESPONDENT**

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QUESTIONS PRESENTED

1. Whether the challenged conduct of a city is antitrust immune if the state legislature contemplated the conduct in articulating its policy to displace competition.
2. Whether a city performing a traditional governmental function pursuant to a state policy to displace competition must be actively supervised by the state to receive *Parker v. Brown* immunity.

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CIRCUIT, ILLINOIS, INDIANA AND
WISCONSIN, IN SUPPORT OF RESPONDENT**

**IDENTITY AND INTEREST
OF THE *AMICI CURIAE***

The States of the Seventh Circuit Court of Appeals, Illinois, Indiana and Wisconsin, respectfully submit this brief as *amici curiae* in support of the respondent, City of Eau Claire, on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Attorneys General of the *Amici* states are the chief law enforcement officers of their respective states. Because of their role, these Attorneys General are often questioned by units of local governments concerning anti-trust immunity for public entities under the state action doctrine. As a result, it is crucial for state attorneys general to readily discern the type of legislative action and municipal conduct which will give rise to state action immunity. The *Amici* submit that an affirmance of the decision of the court below will constitute a significant step toward clarification of the state action doctrine as applied to units of local government.

SUMMARY OF ARGUMENT

This Court has consistently held that state action immunity applies to acts taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. The Court has also made clear that a state policy to displace competition involving cities is sufficiently articulated if it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of." *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 415 (1978); see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982). Here, Wisconsin statutes not only permit cities to refuse sewage services to unincorporated areas but evidence the legislature's intention that annexation, rather than competition, result from a city's provision of such services. See WIS.STAT.

sec. 66.069(2)(c) (1981); sec. 144.07 (1m) (1981). The Wisconsin legislature, therefore, specifically contemplated that cities providing sewage treatment services to unincorporated areas would not have to compete with those areas. The challenged conduct of the City of Eau Claire is consistent with the intention and contemplation of the Wisconsin legislature and is entitled to state action immunity.

Finally, a city performing a traditional governmental function pursuant to a state policy to displace competition need not be actively supervised by the state to receive *Parker v. Brown* immunity. This Court ruled in *City of Boulder* that neutral grants of home rule power to nonsovereigns such as cities do not constitute a clearly articulated and affirmatively expressed state policy to displace competition. However, both home rule and non-home rule units of local government are charged by state legislatures with the sovereign duty to protect the health, safety and welfare of their constituents while providing local governmental services. While such grants of power are insufficient to constitute a policy to displace competition, they are sufficient to eliminate the need for active state supervision over local governmental functions.

ARGUMENT

I.

THE CHALLENGED CONDUCT OF A CITY IS ANTI-TRUST IMMUNE IF THE STATE LEGISLATURE CONTEMPLATED THE CONDUCT IN ARTICULATING ITS POLICY TO DISPLACE COMPETITION.

State action immunity applies to acts taken pursuant to a clearly articulated and affirmatively expressed policy to displace competition with regulation or monopoly public service. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Hoover v. Ronwin*, U.S., 104 S.Ct. 1989 (1984). Such a state policy immunizing the conduct of a city is sufficiently articulated if it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415; see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). This "contemplation" test was well-explained by the Fifth Circuit in *City of Lafayette*:

[A] district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's in-

tended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. (footnotes omitted).

City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976).

The test articulated by the Fifth Circuit and adopted by this Court was applied in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). In *City of Boulder*, this Court aptly noted that a neutral grant of home rule power did not contemplate anticompetitive conduct by a city. The Court concluded that the home rule powers simply did not evidence any legislative intent to limit competition for cable television services or any other services.

Here, of course, the Wisconsin legislature specifically contemplated a city's refusal to provide sewage services to unincorporated areas on a competitive basis. Section 66.069(2)(c) of the Wisconsin statutes expressly permits cities to fix the geographic limits of such services to unincorporated areas and to refuse services beyond the area delineated. Furthermore, section 144.07(1m) makes clear that cities may lawfully refuse the order of a state agency to provide sewage services to an unincorporated area provided the area rejects annexation.¹ It thus not only seems

¹ As the Seventh Circuit stated, "it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area." *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 at 383 (7th Cir. 1983), quoting *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321, 325-26 (1982).

clear that the legislature intended Wisconsin cities to have broad control over the provisions of sewage services, but that annexation, rather than competition, would result from the provision of such services to unincorporated areas. Indeed, under appropriate circumstances, the legislature intended that unincorporated areas were to be annexed and eliminated as competitors of the cities altogether. In view of these legislative provisions, the City of Eau Claire's refusal to provide sewage services to neighboring towns on a competitive basis was contemplated by the Wisconsin legislature in furtherance of a clearly articulated and affirmatively expressed state policy. A more specific legislative authorization to confer state action immunity is unnecessary under this Court's decision in *City of Lafayette*, 435 U.S. at 415.

The Town of Hallie, however, proposes a new test to determine whether anticompetitive conduct is antitrust immune. Apparently dissatisfied with this Court's pronouncement in *City of Lafayette* and *City of Boulder*, that conduct "contemplated" by the legislature is immune, the Town insists that "[t]he proper test is whether the particular conduct of the city 'necessarily follows' from the State's clear affirmative declaration of state policy." Pet. Br. at 27. This "necessarily follows" test is inaccurate for at least two reasons. First, the test ignores the fact that a state policy to displace competition is itself confirmed by a finding that the challenged conduct was contemplated or intended by the state legislature. See *City of Lafayette*, 435 U.S. at 415; *City of Boulder*, 455 U.S. at 55; see also *Antitrust Immunity*, 95 Harv.L.Rev. 435; 445-446 (1981). Second, the attempt to redefine "contemplated" activity as conduct which "necessarily follows" from a legislative

enactment accomplishes little, if anything.² The essential inquiry remains the same—"to include all evidence which might show the scope of legislative intent." *City of Lafayette*, 435 U.S. at 415, quoting 532 F.2d at 434-35. This sort of traditional search for legislative intent is routinely conducted by the federal courts and needs no redefinition. Here, the Seventh Circuit carefully analyzed the relevant Wisconsin statutes and correctly concluded that the challenged conduct of the City of Eau Claire was contemplated by the statutes.

II.

A CITY PERFORMING A TRADITIONAL GOVERNMENTAL FUNCTION PURSUANT TO A STATE POLICY TO DISPLACE COMPETITION NEED NOT BE ACTIVELY SUPERVISED BY THE STATE TO RECEIVE *PARKER v. BROWN* IMMUNITY.

From the town crier in colonial America to the present days of high technology, local units of government have provided essential services to promote the health, safety and welfare of their constituents. For at least the last century, state constitutions and statutes have given independent legal status to these public entities and have specifically delegated to them the responsibility to perform governmental functions. These functions, in turn, have

² The Seventh Circuit concluded that "reasonable or foreseeable" consequences of authorized activity are immune. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983). Other attempts to give a parameter to legislative intent in this regard have been made. For example, in *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) the Eighth Circuit concluded that a "sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross*, 705 F.2d at 1012-1013.

been promulgated and implemented through the years by official documents such as ordinances and regulations, all readily subject to close public scrutiny. Provided local governmental units conform to state-wide policy, states have devoted their limited resources to matters other than the supervision of traditional public services rendered by units of local government. There is no reason to change the practice now. If a city is performing a traditional governmental function pursuant to a state-wide policy to displace competition, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself." *City of Boulder*, 455 U.S. at 71, n.6 (Rehnquist J., dissenting).

Moreover, the states are incapable and unwilling to undertake the enormous burden of actively supervising the broad range of local services provided by public entities ranging from cities and towns to mosquito abatement districts. In Illinois, for example, the legislature eschewed any notion of active supervision in enacting a *Boulder* bypass statute.

In November, 1983, the General Assembly enacted Public Act No. 83-929 which amended a number of statutes governing various local governmental operations.³ The Act amended, *inter alia*, the Municipal Code to include the following language:

It is the policy of this State that all powers granted, either expressly or by necessary implication, by this Code, other Illinois statute, or the Illinois Constitu-

³ In substantially identical language, Public Act No. 83-929 amended or added new paragraphs to the following nine statutes: Ill.Rev. Stat. (1983 Supp.), ch. 24, par. 1-1-10; ch. 34, par. 401; ch. 34, par. 716; ch. 38, par. 60-11; ch. 42, par. 323; ch. 85, par. 2801; ch. 111½, par. 702.22; ch. 122, par. 1-4; ch. 139, par. 38.

tion to non-home rule municipalities may be exercised by those municipalities notwithstanding effects on competition.

It is further the policy of this State that home-rule municipalities may (1) exercise any power and perform any function pertaining to their government and affairs or (2) exercise those powers within traditional areas of municipal activity, except as limited by the Illinois Constitution or a proper limiting statute, notwithstanding effects on competition.

It is the intention of the General Assembly that the "State action exemption" to the application of federal antitrust statutes be fully available to municipalities to the extent their activities are authorized by law as stated herein.

Ill.Rev.Stat. (1983 Supp.), ch. 24, par. 1-1-10. The *Amici* submit that the Illinois statute reflects the proper aversion to active state supervision over the provision of public services by local governmental units.

This Court ruled in *City of Boulder* that neutral grants of home rule power to nonsovereigns such as cities do not constitute a clearly articulated and affirmatively expressed state policy to displace competition. However, both home rule and non-home rule units alike are charged by the state legislatures with the duty to provide local services relating to public health, safety and welfare. While such grants of power are insufficient to constitute a policy to displace competition, they are sufficient to dispense with the need for active state supervision over local governmental functions.

CONCLUSION

For all of the reasons stated herein, the *Amici* respectfully request that the decision of the Seventh Circuit Court of Appeals be affirmed.

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No. 82-1832

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TOWN OF UNION and TOWN OF WASHINGTON,
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v.

CITY OF EAU CLAIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**TOWN OF HALLIE, TOWN OF SEYMOUR,
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**ON WRIT OF CERTIORARI TO THE UNITED STATES
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**BRIEF AMICUS CURIAE OF
THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS
IN SUPPORT OF RESPONDENT CITY OF EAU CLAIRE**

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36.4 of the Supreme Court Rules. The municipal attorneys who have signed this brief are signing on behalf of the municipalities they represent as well as on behalf of NIMLO.

The National Institute of Municipal Law Officers [NIMLO] is a national organization of municipalities operated by their attorneys. NIMLO, founded in 1935 and organized as a nonprofit, nonpartisan association, consists of 1700 local governmental units, or political subdivisions of states, which participate in NIMLO's work through their chief legal officers, variously called city or

county attorney, corporation counsel, city solicitor or law director, and other titles. The city of Eau Claire, Wisconsin is a member of NIMLO.

NIMLO is a nonpolitical, fact-gathering and reporting organization which provides information services and research to its member local governments on current legal problems of particular concern to municipalities, including federal antitrust matters and intergovernmental relations issues.

The local government attorneys who operate NIMLO are responsible for advising municipalities on the antitrust implications of municipal activities in all areas, including licensing, franchising, land use, waste disposal, business regulation, purchasing, and the provision of essential governmental services. The municipal attorneys are also responsible for defending the actions of their governments when challenged in court. Therefore, these attorneys are keenly aware of the great uncertainty in the law regarding the application of antitrust business principles to non-profit governmental activities, and have witnessed firsthand the upheavals wrought by this Court's decisions in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), and *Community Communications v. City of Boulder*, 455 U.S. 40 (1982).

NIMLO recognizes that a test for governmental antitrust immunity which requires continuing, specific, detailed, direct and technical state-level authorization and supervision of local governmental activities is unworkable and out of touch with the reality of state and local governmental relations. Therefore, NIMLO respectfully urges this Court to affirm the decision below, which strikes a proper balance between the needs of local governments and the interests of federal antitrust policy and, perhaps more importantly, correctly analyzes the relationship be-

tween a state and its political subdivisions under the federal antitrust laws.

Consent to the filing of this brief has been granted by both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

The Statement of the Case set forth in Respondent City of Eau Claire's brief on the merits is adopted by the National Institute of Municipal Law Officers for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The application of the federal antitrust laws to legitimate governmental activities has had a crippling effect on local governments. The most visible effect has been an explosion of antitrust suits brought challenging local governmental decisions in federal court.¹ This is not necessarily the most damaging effect, however. While lawsuits are themselves dangerous because of the vast amounts of time and money involved and the attendant danger to the municipal fisc, it is the *threat* of antitrust suits which hangs as a Sword of Damocles over local governing bodies and officials that is most troublesome. The potential of antitrust liability, standing alone, has been sufficient to result in an abdication of local decision making by local governments to those who wield economic and political power sufficient to threaten antitrust lawsuits. Regulatory matters, such as zoning and licensing, are being handled in

¹The NIMLO Survey of Antitrust Suits Against Municipalities lists these cases in detail and is the Appendix to this brief.

a manner not necessarily consistent with the public interest, but instead are being decided on the basis of potential antitrust lawsuits. The fact that such lawsuits might ultimately prove groundless is almost irrelevant to the decision-making process. The public interest is not always served by unregulated and unfettered competition; other factors, such as public health, safety, and welfare, must be included in the local governmental decision-making process. Local government is the unit of government most intimately involved in the myriad daily activities of the Nation's citizens, yet it is the only level of government singled out for potential antitrust liability. The tools of antitrust analysis, as developed by this Court over the last century in numerous cases dealing with private profit-making businesses, are not easily adapted to governmental activities undertaken in the public interest and not for profit.

The narrow construction of the state action immunity test urged by Petitioners is incorrect and does not recognize the reality of state and local intergovernmental relations. The Petitioners' construction is unworkable and impractical because it fails to recognize the degree to which states have desired and intended as a matter of state policy to delegate everyday decision-making authority on matters of local concern to those governmental units closest to the people.

Active state supervision is not required in order for local governments to obtain immunity from antitrust liability. Municipalities are creatures of and are controlled by their state creators. They can only undertake those activities authorized by the state. State courts should be and are the proper authorities to insure that local governments are acting within the scope of their delegated authority. The court below properly recognized the degree to which states have desired to give local governments the flexibility to

make decisions based on the particularized needs of individual communities. What some have labeled as narrow parochial interests is called by others democracy. A broad formulation of the state action immunity test is required in order for local governments to carry out their functions as desired by their state creators.

ARGUMENT

I. THE IMPACT ON THE *LAFAYETTE* AND *BOULDER* DECISIONS ON STATE AND LOCAL GOVERNMENTS

In preparation of this *amicus curiae* brief, NIMLO has undertaken a survey of its 1700 member municipalities in order to assess the impact of the *Lafayette* and *Boulder* decisions. The NIMLO Survey indicates that hundreds of antitrust suits have been filed against local governments, with damage claims totalling billions of dollars. Even though the antitrust laws were developed in order to regulate for-profit businesses, or market participants, the overwhelming majority of lawsuits filed thus far against local governments have challenged traditional municipal regulatory activities, required to be performed by local government under state law. Very few lawsuits have been filed challenging municipal activities which can broadly be characterized as involving the sale or provision of public services; those suits which have been filed in this category have generally involved services traditionally provided by local governments, such as waste disposal, emergency ambulance services, sewer services, and mass transit.

It is also becoming clear that the antitrust laws, like lawsuits brought under 42 U.S.C. §1983, are being used as a vehicle for harassment by those individuals disappointed by a government's decisions. For example, Philadelphia, Pennsylvania is currently defending an antitrust suit challenging its decision to exclude a particular band from

its Mummers Parade. Niagara Falls, New York is a defendant in an antitrust suit concerning the contents of its tourist information guide. Park City, Utah, a town with a population of 2500 people, has found itself a defendant in an antitrust suit concerning a decision over the location of a bus stop. While claims such as these might appear trivial or spurious, they certainly are not to municipal defendants. The Park City litigation has gone on for two years and has cost the city's taxpayers a quarter million dollars in attorney's fees thus far, and the case is still on appeal.

The amount of damages claimed can be truly staggering. An antitrust suit challenging Chicago, Illinois' taxicab ordinance seeks \$320 million in damages, and Chicago is currently defending five other antitrust lawsuits. Richmond, Virginia has found itself a defendant in two antitrust suits seeking \$255 million in damages as a result of zoning decisions. Aspen, Colorado is currently involved in litigation seeking \$145 million in damages over a land use decision. Paradise Valley, Arizona's refusal to approve a subdivision map resulted in a \$48 million claim. Danbury, Connecticut is involved in litigation seeking \$40 million in damages regarding a gas station zoning ordinance. The tiny communities of Lisle and Woodbridge, Illinois are embroiled in litigation over a mandatory annexation-for-services ordinance seeking \$75 million in treble damages. Of course, it is the local taxpayers who must ultimately pay for the defense of such claims and the judgments which can arise.²

²NIMLO is aware of only one case where a judgment was entered against a municipality in an antitrust suit. The \$28.5 million judgment in *Unity Ventures v. Village of Grayslake and County of Lake, et al.* No. 81 C 2745 (N.D. Ill. filed 1981) is substantially greater than the annual budget of the village, equalling 6000% of Grayslake's annual tax levy.

The unique nature of antitrust litigation makes these suits particularly troublesome and dangerous for local government officials. First, because such lawsuits generally involve economic regulation, the amount of damage claims can be immense, particularly in the land use area. Second, the tools of antitrust analysis developed in years of litigation involving profit-making enterprises are not easily adaptable to activities undertaken in the public interest by local governments. Therefore, it is almost impossible for local officials to know in most instances whether the challenged activity in fact violates the antitrust laws. Third, because, in antitrust litigation, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly", *Hospital Building Company v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976), it is likely that antitrust suits filed against local governments will be lengthy and thus costly to municipal taxpayers. Fourth, because antitrust law is so complex, most municipalities, particularly the smaller or rural ones, are compelled to hire expensive outside antitrust counsel to defend themselves adequately. The typical municipal attorney simply does not have the time or expertise to litigate against trained and experienced antitrust counsel. Fifth, because governmental action which harms one party almost invariably will be of benefit to another party,³ it is very easy to allege that municipal officers "conspired" with the benefitted party to the detriment of the harmed party. In well over half the antitrust suits contained in the NIMLO Survey, municipal officials have been sued in-

³For example, the award of contracts or franchises after a bidding process. Two respondents to the Survey reported that they have been threatened with lawsuits by whichever party is not chosen to receive governmental approval for a project financed by Industrial Development Bonds.

dividually as defendants, necessitating their ongoing participation in time-consuming discovery proceedings.⁴

Local government officials faced with actual or threatened antitrust lawsuits against themselves and their municipalities as a result of actions required by state law to be undertaken in the public interest have two choices. They can choose to defend the action. This decision exposes municipal taxpayers to immense potential liability and will cost substantial amounts of money in defense costs. Antitrust conspiracies are easy to allege and, because antitrust litigation almost always proceeds at least through discovery, the suit in all likelihood will drag on for years. Given the complete uncertainty of antitrust law as applied to local governments,⁵ the ultimate outcome would be impossible to predict, and even should the municipality ultimately prevail, it would still have to bear all of its own defense costs.

The second choice available to government officials is to give in to the desires of the antitrust claimant and avoid all the potential costs and risks posed by the antitrust litigation. Instead of taking action in the public interest, the municipality, by choosing the safe way out for its taxpay-

⁴Discovery in municipal antitrust suits can be very troubling for local officials, many of whom serve for little or no compensation. The city attorney from Marquette, Michigan reported in the NIMLO Survey that a city commissioner resigned after spending days being deposed by as many as twelve attorneys during discovery proceedings in an antitrust suit brought against Marquette. In one suit in Illinois, 47 past or present members of various municipal governing boards, as well as two mayors, are currently defendants in a case. *LaSalle National Bank, et al. v. County of Lake, et al.*, No. 81 C 3610 (N.D. Ill.).

⁵The antitrust implications of exclusive franchises, monopoly public services, taxicab fare regulations, licensing restrictions, restrictive zoning laws, and a myriad of other common municipal regulatory activities have never been determined in court.

ing citizens, abdicates its decision-making authority and responsibility to those parties which have the economic power to threaten the local government with an antitrust lawsuit.

Giving in to the demands of the antitrust claimant is not always a viable alternative for municipalities. Disappointed bidders for municipal contracts and franchises can always allege a conspiracy between the successful bidder and the municipality. Property owners rebuffed in their efforts to seek a zoning change for their property can easily allege a conspiracy among other property owners and the city. There is no way for the municipality to avoid undertaking actions which invite antitrust challenges; state laws impose upon them a duty to act.

The NIMLO Survey has also revealed other effects on legitimate governmental activities, apart from actual or threatened litigation, as a result of the *Lafayette* and *Boulder* decisions. Municipalities have become reluctant to develop programs designed, with the best of intentions, to promote the public health, safety, and welfare, for fear of potential antitrust litigation.

For example, Traverse City, Michigan refused to implement a program of low interest loans for home insulation and electric appliance service because of a fear of antitrust liability. The city has also dropped its program of selling garbage bags to its citizens. Moline, Illinois has abandoned plans to construct a regional resource recovery facility and has delayed municipal hospital merger discussions. Fremont, California has refused to implement a program involving firefighter paramedics because of a fear of antitrust exposure. Urbana, Illinois has been unable to construct a waste powered steam incinerator as an alternative to a landfill because antitrust concerns have made it im-

possible to guarantee a sufficient flow of garbage to support the system. The system was designed to supply energy to the University of Illinois. Similarly, Springfield, Missouri has been unable to implement a solid waste resource recovery system. Marin County, California has delayed awarding a needed exclusive franchise for emergency ambulance service because of potential antitrust considerations, and Paradise Valley, Arizona reported that it abandoned plans to implement an emergency home alarm monitoring service by its police department for the same reason.

Well over half of the Survey respondents reported in a more general way that fear of antitrust liability has "chilled" the local government decision-making process or adversely affected the municipality's ability to act in the public interest. As one Survey respondent stated, "even public safety has to take a back seat to antitrust considerations." Whatever antitrust experts might say about the unlikelihood of a municipality and its officials ultimately being found liable for violating federal antitrust laws, the current reality for local governments is one of fear and trepidation.

II. THE CONSTRUCTION OF THE STATE ACTION EXEMPTION TEST URGED BY PETITIONERS IGNORES THE REALITY OF STATE AND LOCAL INTERGOVERNMENTAL RELATIONS AND VIOLATES IMPORTANT PRINCIPLES OF FEDERALISM

Petitioners urge this Court to adopt an interpretation of the state action immunity test which ignores the reality of state and local intergovernmental relations and violates important principles of federalism. All the parties generally agree that a local government is immune from the antitrust laws when it is acting pursuant to a "state policy" to

displace competition which is "clearly articulated and affirmatively expressed." See *Community Communications v. Boulder*, 455 U.S. 40 (1982). The question before this Court is to determine what is meant by "state policy" and "clearly articulated and affirmatively expressed."

State policy can manifest itself in many ways. A state can have a policy of strictly regulating various aspects of local governmental activity or a state can have a policy of permitting local governments some leeway in determining how to carry out their functions. The modern trend is clearly for states to remove themselves from most aspects of local regulation and concern themselves with matters of statewide concern. When one realizes that there are over 80,000 units of local government in the United States,⁶ it is obvious why state legislatures have chosen to remove themselves from most matters of local interest. State legislatures, meeting for an average of less than ninety days per year,⁷ cannot possibly carry out their functions if they have to regulate, in detail, matters of purely local interest. Recognizing this, most states have adopted a policy of increasing local autonomy, giving each unit of local government the authority to decide for itself how to operate within its own regulatory sphere. A state's decision to grant local authority and discretion is no less a declaration of state policy than is a decision to delegate to political subdivisions through specific and detailed grants of authority. State courts stand ready to correct any inequities and improprieties caused by local governments' actions.

⁶INTERNATIONAL CITY MANAGEMENT ASSOCIATION, MUNICIPAL YEARBOOK 1984 at 7 (1984).

⁷COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 1984-1985 at 104-05 (1984).

The question then arises as to what is meant by "clearly articulated and affirmatively expressed." It is clear from the precedents of this Court that clear and affirmative expression of anticompetitive intent does not require that the state compel or require the anticompetitive conduct. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 415-18 (1978).⁸ The grant of governmental powers requires that local governments be given the discretion necessary to carry out their delegated authority; therefore the state need only contemplate a particular anticompetitive activity. Compulsion destroys discretion, and this Court cannot have intended to prohibit states from giving discretionary authority to their political subdivisions. The correct focus is on state authorization and intent, not state compulsion.⁹

If the clear articulation requirement somehow requires a specific reference to a statute or regulation containing anticompetitive language, or reference to the antitrust laws themselves, then the requirement is nonsensical. Until 1978, it was assumed that political subdivisions, like their state creators, were exempted from antitrust liability. Because of this, state legislatures, when drafting statutes and regulations granting broad authority to political subdivisions, had no reason to make explicit statutory reference to the antitrust laws or to specific anticompetitive

⁸"... [I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within legislative intent. Thus a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* at 393-94. See also, *Community Communications v. City of Boulder*, 435 U.S. at 56-57 (1982).

⁹Petitioners' "necessarily follows" theory, Brief of Petitioners at 27, is merely a restatement of the already rejected compulsion argument.

policies. This Court cannot have intended in *Lafayette* and *Boulder* that states redraft all of their statutes and regulations regarding grants of authority to their political subdivisions in order to include specific reference to antitrust considerations. Instead, it must have been intended that lower courts assume that if the states authorized their political subdivisions to undertake certain conduct, then they condoned the anticompetitive restrictions which reasonably and foreseeably flowed from that conduct. This test, adopted by the court below, properly recognizes the current reality of state and local government relations by preserving the authority that states intended to give their political subdivisions. By also focusing on the reasonableness of the conduct, federal antitrust concerns are addressed. The test proposed by the Petitioners would effectively eviscerate the grants of authority which states desired and intended to give to their local governments, and exalts competition over all forms of local governmental regulation, no matter how reasonable that conduct may be.

Petitioners' theory also poses substantial federalism problems. The fundamental policy underlying *Parker v. Brown*, 317 U.S. 341 (1943), and its state action progeny is that state action should not be subject to antitrust scrutiny. Therefore, when the municipality's conduct is authorized by the state, it should be afforded protection from the federal antitrust laws.

State sovereignty is impaired when the federal courts dictate to states the manner in which they choose to delegate authority to their political subdivisions. The state action doctrine is a judicial creation and does not have its basis in express statutory language. Courts should be extremely cautious in applying such a doctrine in a manner

which intrudes on the states' fundamental right to allocate power to their political subdivisions in the manner they see fit.

**III. ACTIVE STATE SUPERVISION IS NOT
REQUIRED FOR A STATE'S POLITICAL SUB-
DIVISIONS IN ORDER FOR THE STATE ACTION
DOCTRINE TO APPLY**

Once it has been determined that a local government's alleged anticompetitive conduct is authorized by the state and is clearly articulated and affirmatively expressed as state policy, there is no need for active state supervision.

While this Court has required active state supervision of private conduct, it has explicitly left open the question of state supervision as applied to local governmental conduct. *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980); *Community Communications v. City of Boulder*, 455 U.S. at 51.

NIMLO does not believe that the drafters of the several federal antitrust statutes intended to reconstitute the forms of the various state governments by requiring that they establish a level of bureaucracy they do not desire to supervise the daily activities of their subordinate levels of government. Nor does NIMLO believe that active state supervision is wise policy.

An active state supervision requirement would require states to establish a State Board of Zoning to review every land use decision made by local governments; a State Franchising and Licensing Board to review every licensing and franchising decision taken by municipal authorities; a State Water and Sewer Board to review every decision and regulation of local water and sewer authorities; and a State Airport Authority to review the activities of local public

airport operators. And not all antitrust lawsuits fit into such neat categories, such as the Park City, Utah case involving an antitrust challenge to a bus stop location. Would a State Bus Stop Authority be required to supervise a local transit authority's bus stop location decisions?

Of course, all of these boards of review would require large staffs in order to supervise actively the thousands of local government decisions subject to antitrust review. Local governments would have to establish equally large staffs in order to plead their cases before the various state agencies, which would be unfamiliar with the local conditions which led to the initial decision. A party to the proceedings who was disappointed by the decision could then seek a judicial remedy, with the state itself a defendant in a case that is really a matter purely of local concern. The implementation of the local government's decision would have to be delayed as it wound its way through the state bureaucracy. In short, the active state supervision requirement would change the face of state and local government relations, and change it substantially for the worse.

The federalism problems created by such a scenario are clear. The authority to act in local matters currently possessed by local governments would be eviscerated. This authority was granted to local governments in the first place either by the various state legislatures or by the people themselves through their state constitutions. The antitrust laws were not intended to reallocate this power.

Petitioners argue forcefully that local governments should be treated in the same manner as private entities for purposes of the active state supervision requirement. A recent decision from the Maine Supreme Court states clearly the reason that the active state supervision is not required for local government activities:

Towns and cities are mere agencies of the State. They are purely creatures of the Legislature and their powers and duties are within its control. . . . [That control] is absolute and all embracing except as expressly or by necessary implication limited by the Constitution. *City of South Portland v. State of Maine*, 476 A.2d 690 (Me. 1984).

See also 2 E. McQUILLIN, MUNICIPAL CORPORATIONS § 4.03 (3d ed. 1979); *Williams v. Baltimore*, 289 U.S. 36 (1933); *Trenton v. New Jersey*, 262 U.S. 782 (1923). Private businesses clearly are not agencies or creatures of the state, nor are they controlled by the state.

Throughout their brief, Petitioners emphasize that the state action doctrine should be applied identically to private entities and local governments. This fails to recognize an obvious point: a state's interest in regulating its political subdivisions is far greater than its interest in regulating private business entities which happen to be located within its borders. A political subdivision carries out its state's policies each time it acts, because the political subdivision is created and controlled by the state. When a private, for-profit business acts, it is carrying out its own interests and policies.

The rationale for the active state supervision requirement is to avoid situations whereby private parties, acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, abuse the anticompetitive power given them by the state. In striking down a state law because it created a private price-setting mechanism which the state did not actively supervise, the Court stated, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy

cloak of state involvement over what is essentially a private [anticompetitive activity]." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. at 105. Active state supervision of private parties insures that their conduct is sufficiently state action to be immune from antitrust challenges.

This function is already served when local governments meet the "clear articulation" requirement. Local governments can exercise only those powers expressly delegated to them by the state. Clear articulation is for local governments what active state supervision is for private parties. As one leading commentator has stated:

. . . [R]equiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity. AREEDA, ANTITRUST LAW ¶212.2a, at 47 (1982 Supplement).

Active state supervision insures that there is public participation and control over private anticompetitive restraints. Municipal officials are generally accountable politically for their activities, and state sunshine laws and open meetings acts insure that there is public participation in the local government's decision-making processes. State and public control over local governmental activity is inherent, but such is not the case with private parties. That is why private parties are subject to active state supervision and why local governments should not be so subject.

CONCLUSION

The federal antitrust laws should not be used as anticorruption statutes. The Hobbs Act,¹⁰ The Racketeer Influenced and Corrupt Organizations Act,¹¹ the Civil Rights Act of 1871¹² and other state and federal anticorruption and open government laws already serve this purpose. The court below properly balanced the federal interest in competition, as embodied in the various federal antitrust statutes, with the state's interest in delegating discretionary authority to its political subdivisions. NIMLO respectfully requests that the decision below be affirmed.

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¹⁰18 U.S.C. §1951 et seq.

¹¹18 U.S.C. §§1961-1968.

¹²42 U.S.C. §1983.

**NATIONAL INSTITUTE OF MUNICIPAL LAW
OFFICERS SURVEY OF ANTITRUST SUITS
AGAINST MUNICIPALITIES**

September 1984

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INTRODUCTION

NIMLO solicited this information from its 1700 member municipalities. Because there are over 80,000 units of local government, the Survey is not meant to include all municipal antitrust litigation. However, the NIMLO Survey does constitute a broad representative sampling of the cases.

The NIMLO Survey lists 160 municipal antitrust suits, the overwhelming majority of which have been instituted since 1981. The total damages claimed are in excess of \$4.9 billion, exclusive of the 100 suits which do not contain a prayer for a specific amount of damages, or for which the damage claims are not known by NIMLO.

SUMMARY OF THE RESULTS OF THE NIMLO SURVEY ON ANTITRUST

Breakdown by Subject on Antitrust Suits Against Municipalities and Damages Claimed Where Available

Cable Television Regulation

1. *Community Communications v. Boulder*, 102 S. Ct. 835 (1982) (damages unknown).

Boulder, Colorado, a city with very broad home rule powers, sought to prevent the existing cable franchise from expanding into new areas of municipality pending applications from other cable television companies. To accomplish this, the city passed a 90 day moratorium on expansion of cable television operations. The franchisee then brought suit under various antitrust theories.

HELD: The broad delegation of general home rule powers by the state to the municipality was insufficient "state action" exemption under *Parker*, 317 U.S. 341 (1943). There must be a clear articulation and affirmative expression by the state approving the municipality's anticompetitive actions. The case involved only the exemption issue and the merits were never decided.

SETTLEMENT: In exchange for the dropping of the lawsuit, the city will allow Community Communications to have nonexclusive rights to municipal utility easements for 15 years, and the company will have two years in which to expand into the entire city. Boulder will not have the right to regulate rates or programming.

2. *Melhar Corp. v. City of St. Louis*, Civ. No. 82-1064-EM (E.D. Mo. 1981), appealed to 8th Cir. Court of Appeals No. 82-1064 (damages claimed \$72,000,000).

Suit concerns revocation of a franchise to operate a cable television franchise.

HELD: District Court decision dismissing the complaint, 530 F.Supp. 85 (E.D. Mo. 1981), upheld on the grounds that a state court judgment cancelling the franchise is res judicata.

3. *William Danks v. City and County of Denver*, No. 82-CV-0484 (D. Colo. 1982) (damages unknown).

An individual brought suit against Denver, Colorado, and various cable television companies, alleging that the proposed grant of a cable television franchise to only one cable television company was a violation of the Sherman Act. Suit was brought prior to the completion of the competitive bidding process.

HELD: Suit voluntarily dismissed by Plaintiff.

4. *Hopkinsville Cable TV v. Pennyroyal*, 562 F.Supp. 543 (W.D. Ky. 1982); (damages unknown).

A cable television company brought suit against the city and a competing firm, alleging that the city's award of an exclusive franchise to operate a cable television system within the city was a violation of the Sherman Act.

HELD: The District Court held, in motions prior to trial, that the award of an exclusive cable franchise fell within the *Parker* state action exemption. The court found that a state constitutional provision granting the municipality the power and responsibility to control and franchise public utilities entering the municipal marketplace was a clear articulation of state policy authorizing the exclusive franchise. The case has been appealed to the 6th Circuit Court of Appeals.

5. *Affiliated Capital v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984) (damages not claimed against City.)

A cable television company brought suit against competing cable television companies, the city, and the mayor, alleging a conspiracy to divide territory and to prevent the plaintiff from operating a cable television franchise in the city.

HELD: Territorial division of the municipal marketplace by the mayor and competing companies was a per se violation of the Sherman Act. The mayor is entitled to the good faith immunity defense, and therefore is not individually liable.

6. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (damages unspecified).

A cable television company sued the city, alleging a right to lay cable television wires under the public way without a franchise. Another company did have a non-exclusive franchise which was awarded after a competitive bidding process which the plaintiff did not participate in.

HELD: Denial of injunction proper where plaintiffs failed to establish with probability that it would prevail on its Sherman Act claim.

7. *TCI Cablevision v. Jefferson City* (cite unavailable) (damages unknown).

Cable television company alleged that the revocation of its franchise and the pending award of the franchise to a new operator constituted a violation of antitrust laws.

HELD: Suit settled.

8. *CTI v. Jefferson City*, No. 83-4068-CV-C-5 (D.Mo. 1983) (damages claimed \$280,000,000).

Suit by cable television company against municipality and another company challenging, under Sherman Act, award of non-exclusive franchise to a competitor.

HELD: Suit against city dismissed.

9. *Catalina Cablevision v. Tucson*, Civ. 82-459 TUC (D. Arizona 1982) (damages unknown).

Suit involves award of non-exclusive cable television franchise after intense competitive bidding process.

HELD: State statutes granting municipalities the authority to regulate cable television is an insufficient grant of authority for a state action exemption. Case on appeal to the 9th Circuit Court of Appeals.

10. *Universal Cable v. City of Los Angeles*, No. 82-5202 (C.D. Cal. 1982) (damages claimed \$255,000,000).

Suit brought by company engaged in cable television against municipality, mayor, and other municipal officials, alleging that defendants' failure to award them a franchise to operate violated the Clayton and Sherman Antitrust Acts.

HELD: Suit filed October 6, 1982, still pending.

11. *Century Cable v. City of San Buenaventura*, No. 82-5274 (C.D. Cal. 1982) (damages unknown).

Plaintiff corporation brought suit alleging that the municipality and a competing cable television corporation conspired to keep monopoly control over the television market in the city in violation of the Sherman Act.

HELD: Suit settled.

12. *Warner Amex Cable v. City of De Kalb*, No. 83-CH 17 (Ill. Cir. Crt.) (damages unspecified).

Suit by cable company challenging municipal activities regarding the company's desire to implement a rate increase. Suit claims the municipality and its Cable Television Board conspired against the cable company in violation of the Sherman Act.

HELD: Suit pending.

13. *Preferred Communications v. Los Angeles*, CV-83-5846 (C.D. Cal. 1983) (damages unspecified).

Sherman Act and Clayton Act lawsuit brought by cable television operator against municipality challenging mu-

municipal method of awarding cable television franchises through a bidding process.

HELD: State statute giving municipalities the authority to grant cable television franchises is a sufficient grant of authority to immunize the municipality from antitrust liability. An appeal is expected.

14. *Century Federal v. Cities of Palo Alto, Atherton, and Menlo Park, California*, 579 F.Supp. 1553 (N.D. Cal. 1984) (damages unknown).

Sherman Act suit brought by potential cable provider challenging franchising process of defendant municipalities which calls for competitive bidding prior to the award of a single franchise.

HELD: State statute giving municipalities the authority to grant cable television franchises sufficient grant of authority for state action exemption. Since the term "franchising" connotes a degree of exclusivity, it can be inferred that the state intended to displace free competition with regulation. The exemption is available without active state supervision and, though the exclusive franchising agreement was not compelled, it was authorized.

15. *Pacific West Cable v. City of Sacramento*, No. 5-83-1034 (E.D. Cal. 1983) (damages unknown).

Sherman Act suit brought by cable operator challenging the city's request for proposals process as an artificial and unnatural monopoly and as an unreasonable restraint of trade.

HELD: Suit still pending.

16. *Liberty T.V. Cable v. City of San Bernardino*, No. 82-5432-WMB (C.D. Cal. 1982) (damages unknown).

Suit brought under Sherman Act by already franchised cable operator challenging municipality's attempt to regulate rates in accordance with the franchise agreement.

HELD: Suit settled.

17. *Matrix Enterprises v. Millington Telephone*, No. C-82-2343-H, (W.D. Tenn. 1983) (damages unknown).

Plaintiff cable television service providers brought suit alleging, inter alia, that the defendant municipality, defendant telephone company, and defendant current cable operator conspired to prevent plaintiff from entering the local cable television market. The complaint challenged, on antitrust grounds, municipal rate regulation, a three-percent franchise fee, a thirty-five-year franchise agreement, and restrictions on franchise transfers.

HELD: State statutes giving municipalities the "power and authority" to regulate local cable television operations is a sufficient grant of authority for the state action exemption. Statute need not require the grant of exclusive franchise; all that needs to be shown is state contemplation of actions to displace competition. Appeal to 6th Circuit expected.

18. *Acton CATV v. City of Duarte*, No., CV83-1018 R.G. (MCX) (C.D. Cal. 1984) (damages unknown).

De facto cable operator brought suit against the municipality under the Sherman Act after the municipality sought to revoke the franchise because of poor service and to re-issue the franchise under a competitive bidding process.

HELD: Summary judgment for defendants. The plaintiffs cannot show any anticompetitive effect, intent, or in-

jury from the city's action. In addition, state statutes similar to #14, above, immunize the city from antitrust liability. An appeal is pending in the Ninth Circuit.

19. *Video International v. City of Dallas and Warner-Amex Cable*, CA3-81-1772-R (N.D. Tex. 1981) (damages claimed \$7,500,000).

SMATV operator brought Sherman Act suit alleging that municipal zoning ordinances prevent competition with the franchise cable operator.

HELD: Trial pending.

20. *Cox Cable v. Marquette, Michigan, et al.* (citation omitted) (damages unknown).

Sherman Act suit by cable operator against the city, the mayor, various city commissioners, and a competing company concerning the award of cable franchise.

HELD: Suit dismissed. (Defendants' legal expenses totalled in excess of \$1 million).

21. *Claremont Communications v. Claremont, California*, CV-83-3084 (C.D. Cal. 1983) (damages claimed \$1000).

Suit brought by cable operator alleging that any franchise requirements containing substantive requirements violate antitrust laws. The mayor and various officials have also been sued.

HELD: Suit pending.

22. *Matrixvision v. Bedford Heights, Ohio*, No. C84-2063 (N.D. Oh. 1984) (damages unspecified).

Suit brought by operator against city under Sherman Act after the city cancelled the franchise for failure to pay the franchise fee.

HELD: Suit still pending.

23. *Daley v. Durham, New Hampshire*, 733 F.2d 4 (1st Cir. 1984) (damages unspecified).

Antitrust suit brought by cable company against competitors, city and individual municipal officials challenging the award of a cable franchise.

HELD: Antitrust action dismissed for lack of removal jurisdiction.

24. *Tennessee Cable Television v. Memphis Light, Gas, et al.*, No. 82-3946 (D.Tenn. 1982) (damages unspecified).

Suit brought by cable association and individual cable operators against 19 local municipal utilities alleging a conspiracy with regards to rates to be charged for utility pole rental agreements.

HELD: Suit settlement discussions ongoing.

Land Use and Zoning

1. *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984) (damages claimed \$15,000,000).

Plaintiffs brought suit alleging that a moratorium on the issuance of building permits, and a new comprehensive zoning ordinance, combined to create a violation of federal antitrust laws. The plaintiffs were disappointed developers who were unable to construct a new shopping center as a result of the moratorium and subsequent new comprehensive zoning law.

HELD: Summary Judgment granted defendants. Affirmed on Appeal. State policy, as embodied in statutes authorizing urban renewal projects, authorized the alleged anticompetitive activities with an intent that competition be displaced. Active state supervision not needed for governmental functions.

2. *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (damages claimed \$180,000,000).

Plaintiff corporation had for years attempted to develop property for a shopping center but had failed to obtain tenants. A competing developer desired to construct a mall on other land in the city, and obtained the necessary rezoning from the town. Plaintiff then brought an antitrust action against the city and the competing developer.

HELD: The *Noerr-Pennington* doctrine does not protect lobbying efforts which have been accompanied by illegal or fraudulent actions. Case remanded for trial. At trial, jury verdict for the defendants. Notice of Appeal filed.

3. *Mason City Center v. City of Mason City*, 468 F.Supp. 737 (N.D. Ia. 1979) (damages unspecified).

Developers brought suit, alleging that the city and another developer agreed to construct a downtown shopping center and to prevent plaintiffs from constructing a regional shopping center which would compete with the downtown center. It was alleged that the city's refusal to rezone plaintiff's property to permit construction was a result of this agreement, and thus was a violation of the Sherman Act.

HELD: Jury verdict in favor of city affirmed at 671 F.2d 1146 (8th Cir. 1982).

4. *Miracle Mile v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980) (damages claimed \$49,200,000).

Developers of a shopping center brought suit against the city and a competing developer, alleging that the city's petitioning of state and federal agencies in order to insure that the developers complied with applicable environmental regulations constituted a violation of antitrust laws.

HELD: The *Noerr-Pennington* doctrine immunizes the defendants from antitrust liability for invoking administrative and judicial processes irrespective of the anticompetitive intent. See *Eastern Railroad v. Noer Motor*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

5. *Richmond Hilton v. City of Richmond*, C.A. No. 81-1100R (E.D. Va. 1981) (damages claimed \$240,000,000).

Suit by developers alleging zoning laws were utilized in an anticompetitive manner in order to promote development in a redevelopment area.

HELD: The same law firm may represent both the city and the city officials sued in their individual and official capacities. Absent a showing of an actual conflict of interest among the defendants, the same firm may represent all municipal defendants. *Richmond Hilton v. City of Richmond*, 690 F.2d 1086 (4th Cir. 1982). The underlying suit on the merits has been settled.

6. *Canal Square v. City of Richmond*, C.A. No. 81-1115 (E.D. Va. 1981) (damages claimed \$15,000,000).

HELD: Same as No. 5.

7. *Aspen Post v. Board of County Commissioners*, No. 81-1400 (D.Colo.1981) (damages claimed \$135,000,000).

Developers desiring to construct hotels and condominiums in a skiing area brought suit, alleging that various governmental bodies delayed the project by refusing to issue permits and by changing the zoning laws to prevent development. It was alleged that these activities were done to promote municipally owned properties.

HELD: Suit still pending.

8. *Jonnet Development v. City of Pittsburgh*, 558 F.Supp. 962 (W.D. Pa. 1983) (damages unknown).

Plaintiff developer alleged a conspiracy among defendants to monopolize the hotel business in the central business district as a result of the public acquisition of a building for subsequent reconveyance to a third party for development.

HELD: Equitable relief denied under the doctrine of unclean hands. Affirmed by 3rd Circuit without an opinion. Review denied by the Supreme Court, No. 81-2274, cert. denied, 51 U.S.L.W. 3254 (Oct. 4, 1982). On the merits, 558 F.Supp. 962 (W.D. Pa. 1983), the court held that plaintiff failed to provide evidence of a contract, combination, or conspiracy in pursuit of an illegal restraint of trade. In addition, state action immunity protected the municipal defendants from liability.

9. *English Road v. County of San Bernardino*, No. CU82-4497 TJH (C.D. Cal. 1982) (damages unknown).

Suit by developer challenging, under the Sherman Act, the adoption of a land use plan which did not allocate to plaintiff the density for development he desired.

HELD: Suit still pending.

10. *Ossler v. Norridge*, 557 F.Supp. 219 (N.D. Ill. 1983).

Property owners brought suit challenging, under Sherman Act, the municipality's refusal to rezone their property and increase potential for development.

HELD: Since plaintiffs failed to allege anticompetitive motivations or consequences in the failure to rezone, the antitrust claims are insufficient.

11. *Omni Outdoor Advertising v. City of Columbia, et al.*, Civ. Act No. 82-2872. (\$2,000,000).

Suit alleges that city and another billboard company conspired, via zoning laws, to prohibit plaintiff corporation from entering the billboard market within the municipality.

HELD: Allegations that municipality participated in a conspiracy to violate the antitrust laws defeats any claimed state action exemption. See 566 F.Supp. 1444 (D.S.C. 1983).

12. *Brontel Ltd. v. City of New York*, 571 F.Supp. 1065 (S.D.N.Y. 1983) (damages unspecified).

Suit brought by property owners alleging that the municipality illegally restrained trade by exempting city owned property from rent control. Suit was brought under §§1, 2, and 3 of the Sherman Act.

HELD: State statutes explicitly giving municipalities the power to adopt and administer rent control ordinances, and the authority to exempt city property from

such laws, sufficient to give municipality a state action exemption from antitrust laws. Appeal pending.

13. *Detyens v. Charleston*, No. 82-2071-8 (D.S.C. 1983) (damages unspecified).

Plaintiff property owner, who desired to construct a hotel on his property, brought antitrust suit alleging that the rezoning of his property prevented him from constructing a hotel on his land. It was alleged that the rezoning was done at the behest of other hoteliers in order to restrict competition.

HELD: Suit still pending.

14. *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

Sherman Act suit brought by developers challenging municipality's refusal to vacate certain platted streets unless developer dedicated to municipality land containing geothermal wells.

HELD: District Court dismissal of plaintiff's claims overturned. Factual determinations must be made as to the developer's ability to enter the geothermal energy market and as to the interstate commerce jurisdiction requirement. State statutes do not expressly declare that cities may monopolize the geothermal market; no state action exemption.

15. *Racetrac Petroleum v. Prince George's County*, No. R-83-3073 (D. Md. 1983) (damages claimed \$10,400,000).

Suit brought under Sherman Act against county and its officials alleging a conspiracy in the denial of a special use permit to operate a gas station.

HELD: Suit still pending.

16. *Sporck v. Danbury, Connecticut*, No. B-80-2 (D. Ct. 1983) (damages claimed \$40,000,000).

Suit brought against zoning board and its members challenging on antitrust grounds a zoning ordinance prohibiting gas stations within 1500 feet of each other.

HELD: Suit pending.

17. *LaPlace du Sommet v. Paradise Valley, Arizona*, (citation omitted) (damages claimed \$48,000,000).

Suit brought against municipality alleging that denial of final subdivision plat approval violated antitrust laws.

HELD: Suit settled; city approved subdivision rather than contest the suit.

18. *4790 El Cajon v. San Diego, California*, No. 82-0509 (I) (S.D. Cal. 1982) (no damages claimed).

Suit brought against police chief and city challenging zoning ordinance requiring 1000 feet between adult entertainment establishments.

HELD: Suit voluntarily dismissed.

19. *Calton Homes v. Township of Princeton, New Jersey*, No. 84-2013 (damages claimed \$5,000,000).

City, township attorney, planning board members and municipal council members sued for refusing to settle litigation with another named defendant involving zoning regulations.

HELD: Suit still pending.

20. *Miami International Realty v. Mt. Crested Butte*,

Colorado, 579 F.Supp. 68 (D. Colo. 1984) (damages claimed \$1,650,000).

Sherman Act suit brought against city and its attorney, manager, and a councilman alleging a conspiracy in restraint of trade via regulations concerning sale and solicitation of time share units.

HELD: Trial set for February, 1986.

21. *Auton v. Dade City, Florida*, No. 84-157-CIV-T-17 (S.D. Fla. 1984) (injunctive relief only).

Sherman Act suit brought challenging ordinance which prohibits well drilling within city limits.

HELD: Suit pending for trial.

22. *Traweek v. San Francisco, California*, (citation omitted) (damages claimed \$800,000,000).

Suit brought by developer challenging a municipal ordinance restricting condominium conversions as a conspiracy to eliminate competition.

HELD: Suit still pending.

23. *Barton v. Riverside, California*, (citation omitted) C.D. Cal. 1984) (damages unspecified).

Plaintiff developer brought antitrust suit against city and individual planning board and council members after they refused to extend the termination date of a subdivision map.

HELD: Suit still pending.

Waste Collection and Disposal

1. *Hybud Equipment v. Akron*, 654 F.2d 1187 (6th Cir. 1981), remanded in light of *Boulder*. (Damages unknown)

Corporation involved in waste disposal challenged a municipal ordinance monopolizing for the city garbage collection and disposal as well as eliminating competition in the marketplace for recyclable wastes. The city needed this monopoly in order to construct an energy plant using waste material.

HELD: In remand from the Supreme Court, the District Court held that the municipal scheme was protected from the antitrust laws under the state action immunity doctrine. No. C78-1733A (N.D. Oh. April 6, 1983).

2. *Central Iowa Refuse v. Des Moines*, 715 F.2d 419 (8th Cir. 1983) (damages unknown).

Action brought challenging a municipal cooperative requirement that all solid waste be brought to municipal landfill. Suit has delayed for over one year construction of municipal landfill.

HELD: The legislature contemplated the imposition of restrictions on competition in the disposal of solid waste in order to promote the financial viability of the metropolitan area solid waste agency and, therefore, the agency's attempt to require that all solid waste generated within the geographic area covered by it be disposed of at its facilities was protected from antitrust scrutiny by the state action exemption. It was not necessary that the state supervise the agency's activities for it to qualify for the state action exemption.

3. *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982) (damages unknown).

Action brought by former rubbish collector alleging that the city's entrance into the solid waste collection business and underpricing its service violated antitrust laws.

HELD: The municipal rubbish collection business here challenged had an insufficient nexus with interstate commerce and thus the suit could not be maintained.

4. *D.E.S. Waste Control v. City of Carrollton*, No. C82-10-N (N.D. Ga. 1982). (\$1,050,000).

Suit challenging the operation of a city industrial waste disposal system. Mayor and City Council members sued individually.

HELD: Suit still pending.

5. *Asher v. Doniphan, Mo.*, Civ. Act. No. 582-0097C (E.D. Mo. 1982). (damages of \$800,000 claimed.)

Suit brought by individual in the waste disposal business alleging that the municipality's exclusive operation of the waste collection system violated the antitrust laws.

HELD: Suit still pending.

6. *City of Camarillo v. Spadys Disposal Service*, 2d Civil No. 6591 (Cal. App. 1983).

City brought suit seeking an injunction to enjoin defendant waste disposal company from hauling waste without a permit.

HELD: The city's refusal to grant permits to more than one company is not an antitrust violation. State statutes

intended to permit cities to create waste disposal systems when such monopolies are in the public interest. The statutes create a state action exemption.

7. *A-1 Carting v. City of Albuquerque*, No. 83-07187B (damages unspecified).

Suit brought under Sherman and Clayton Antitrust Acts, challenging municipal monopoly of solid waste collection and removal to land fills.

HELD: Suit still pending.

8. *Ideal Waste Systems v. Provo City*, No. 82-082W (D. Ut. 1983). (damages unspecified).

Sherman Act suit brought by corporation engaged in solid waste collection and disposal business. Suit challenges a municipal monopoly on solid waste collection and disposal.

HELD: Suit still pending.

9. *L & H Sanitation v. Lake City Sanitation*, No. B-C-82-93 (E.D. Ark. 1983) (damages unspecified).

Sherman Act suit brought by waste disposal company against a competitor and the municipality challenging exclusive award of a franchise to haul and dispose of solid waste.

HELD: State statutes giving municipalities the power to contract for solid waste disposal services, and to regulate solid waste disposal, is sufficient for a state action exemption from the antitrust laws. No need for state statutes to state expressly that monopoly franchises may be awarded.

10. *Windisch v. Acenbrack*, No. 79-904-CIV-T-WC. (D. Fla. 1979) (damages unspecified).

Antitrust suit brought against Pinellas County, Florida, alleging that the refusal of the county to grant a permit to operate a landfill violated the antitrust laws.

HELD: County's Motion to Dismiss on state action grounds denied. Trial on merits pending.

11. *Hudson v. City of Chula Vista*, No. 83-8151 (9th Cir.) (damages unknown).

Suit brought by potential suppliers of trashhauling services challenging municipal award of exclusive contract to competing trashhauling firms and lack of proper rate regulation.

HELD: Exclusive contract a per se antitrust violation. No state action exemption because there is no active state supervision and no specific explicit state authorization. Case currently on appeal to the 9th Circuit Court of Appeals.

12. *Royal Refuse v. Springfield, Oregon*, No. 83-6203-E (D. Or. 1983) (damages claimed \$37,000).

Sherman Act suit challenging award of exclusive contract for garbage disposal.

HELD: Suit pending.

13. *Ideal Waste Systems v. Orem, Utah*, No. C-83-0900-W (D. Ut. 1983) (damages unspecified).

Sherman Act suit challenging an alleged monopolization by the city of waste collection services.

HELD: Suit dismissed by stipulation.

14. *Scay Brothers v. Albuquerque, New Mexico*, CIV-83-0694 (D. N.M. 1983) (damages unspecified).

Suit brought by operator of garbage collection business challenging municipal monopolization of waste disposal business.

HELD: Suit pending.

Hospitals and Ambulance Service

1. *Capital Ambulance v. Columbia, South Carolina*, C.A. No. 80-670-0 (D.S.C. 1980) (damages unknown).

Suit by ambulance service operator alleging that the award of tax subsidies by Columbia to a competitor and other similar activities prevented plaintiff from operating within the city.

HELD: Settled by consent decree.

2. *Huron Valley Hospital v. City of Pontiac*, 466 F.Supp. 1301 (E.D. Mi. 1979) (damages unknown).

Plaintiff alleged conspiracy among local and state government officials to prevent plaintiff from providing hospital facilities and services in violation of antitrust laws. It was alleged that the failure to issue the necessary permits and certificates was a result of anticompetitive animus.

HELD: Exhaustion of administrative remedies, ripeness, abstention, and comity precluded a review on the merits. In addition, the *Noerr-Pennington* doctrine protected defendants' activities. Remanded, 666 F.2d 1029

(7th Cir. 1982), pending completion of state administrative and judicial proceedings.

3. *United Pacific Ventures v. Mercy*, Civ. LV. 80-163, RDF (D. Nev. 1981) (damages claimed \$1,260,000).

Plaintiff ambulance company alleged the failure of municipal defendants to license the company was a violation of antitrust laws.

HELD: The complaint's allegations had an insufficient nexus with interstate commerce, and a state statute giving municipalities the power to license ambulance service met the *Parker* state action immunity test.

4. *Gold Cross v. City of Kansas City, Mo.*, 705 F.2d 1005 (8th Cir. 1983) (damages unspecified).

Plaintiff alleged that the award of an exclusive franchise to operate an emergency ambulance service within the city limits violated antitrust laws.

HELD: State statute authorizing municipalities to contract with companies to provide emergency services was a sufficient state action exemption under *Parker*. The state need not mandate the anticompetitive conduct, it only needs to contemplate such conduct. There is no need for active state supervision. Petition for Certiorari pending.

5. *Professional Ambulance v. Hartford*, No. H82-970 (D. Ct. 1982) and *Trinity Ambulance v. Hartford*, No. H82-969 (D. Ct. 1982).

Antitrust action alleging that the city's award of contracts to two companies to provide exclusive emergency ambulance services violated the Sherman Act. The city awarded the contracts after a competitive bidding process undertaken pursuant to a state statute.

HELD: Suit still pending.

6. *Springs Ambulance v. Rancho Mirage, Indian Wells, et al.*, No. 82-5917 (damages unspecified).

Plaintiff ambulance service brought suit under the Sherman Act alleging a concerted refusal to deal and an unreasonable restraint of trade in the provision of emergency ambulance services.

HELD: State statutes regulating emergency services do not encompass price-fixing and predatory pricing practices allegedly carried on by the defendant municipalities. Ambulance services have sufficient nexus with interstate commerce to maintain federal jurisdiction. Case currently on appeal to 9th Circuit.

7. *Feldman v. Jackson Memorial*, 571 F.Supp. 1000 (S.D. Fla. 1983) (damages unknown).

Podiatrist brought Sherman Act suit against various private and public hospitals alleging a combination or conspiracy in restraint of trade by their refusing to grant plaintiff staff hospital privileges.

HELD: Evidence wholly failed to show a combination or conspiracy in restraint of trade, nor was there a showing of market impact or fact of damage. Directed verdict granted all defendants, obviating need for a decision on the public hospitals claimed state action immunity.

8. *Federal Ambulance v. Sioux Falls, South Dakota* (D. S.D. 1983) (damages claimed \$165,000).

Plaintiff ambulance company brought suit under Sherman Act alleging that city and other companies conspired to monopolize ambulance services.

HELD: Suit pending.

9. *Springs Ambulance v. Indio, California*, (citation omitted) (damages unspecified).

Same facts as No. 6 above.

HELD: Suit pending.

10. *Patient Transfer v. Little Rock, Arkansas, et al.*, No. LR-C-84-161 (E.D. Ark. 1984) (damages claimed \$150,000).

Plaintiff ambulance operator brought Sherman Act suit challenging municipal ordinances establishing an ambulance licensing procedure whereby only one company may be granted a license to operate within the city. The suit also challenges a fee placed on current operators pending the establishment of monopoly service.

HELD: Suit still pending.

Water and Sewage Systems

1. *Community Builders v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (damages claimed \$1,536,000).

Antitrust action brought to challenge hook-up fees for provision of municipal water service outside municipal boundaries.

HELD: Defendant's motion for summary judgment granted. State policy prohibiting competition between municipal utility services and other utility providers constituted state action exemption under *Parker* and *Lafayette*.

2. *Tuld v. City of Scottsdale and City of Phoenix*, 665 F.2d 1054 (9th Cir. 1981) (\$750,000).

Suit brought challenging municipal charges for water hook-up.

HELD: Court held in favor of city; decision in *Community Builders, supra*, dispositive (lower court affirmed without opinion).

3. *Shrader v. Horton*, 626 F.2d 1163 (4th Cir. 1980), affirming 471 F. Supp. 1236 (W.D. Va. 1979) (damages unknown).

Antitrust suit challenging compulsory hook-up with municipal water system.

HELD: State statute requiring owners of land abutting a street with a public water supply line to connect to such line is sufficient to establish state action exemption under *Parker*.

4. *Howland Township v. City of Warren*, C.A. No. 81-954 (N.D. Oh. 1981) (damages claimed \$1,890,000).

Antitrust action brought challenging a municipal policy of providing water only to municipal residents.

HELD: Defendant's motion to dismiss pending.

5. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) (damages unknown).

Antitrust action brought by towns against a city which required the towns to annex to the city in order to tie into the sewer system.

HELD: State law giving cities broad discretionary powers over sewer systems immunized the city's annexa-

tion policy. No active state supervision needed for state-action exemption to apply. State need not mandate or compel anticompetitive conduct; all that is needed is authorization or contemplation of anticompetitive conduct. Case pending in Supreme Court to which this brief is addressed.

6. *Coral Ridge v. City of Margate*, No. 83-6267 (S.D. Fla. 1983). (\$30,000,000 damages claimed).

Suit alleges that the city of Margate is utilizing a legally recognized monopoly for water and sewer, granted to it by state statute, in furtherance of a conspiracy with its electorate. This conspiracy is to provide for prepayment of capacity reservation charges to be utilized for the construction of new plant capacity thereby keeping monthly user charges at a lower rate.

HELD: Suit settled.

7. *LaSalle National Bank v. DuPage, Lisle, and Woodridge*, No. 82-6517 (N.D. Ill. 1982). (damages claimed \$75,000,000).

Sherman Act suit brought by trustee bank against three municipalities alleging various contracts and conspiracies in restraint of trade. Suit challenges, inter alia, a municipality's refusal to provide water service without annexation, as well as a Boundary Line Agreement entered into by two defendants.

HELD: State statutes giving municipalities the power to contract and associate among themselves was not sufficient to warrant state action immunity since anticompetitive conduct was not authorized by the statute, or by cooperative agreement. Motion for Reconsideration pending.

8. *City of Northglenn v. City of Thornton*, No. 83-1058 (D. Colo. 1983) (damages unknown).

Suit by municipality against another municipality challenging, on antitrust grounds, a contractual provision whereby the plaintiff municipality agreed not to provide sewer services outside the municipal boundary if the defendant municipality was able to provide such service.

HELD: Preliminary injunction denied. Suit still pending.

9. *Vickery Manor v. Mundelein*, 575 F.Supp. 996 (N.D. Ill. 1983) (damages unknown).

Suit brought under §3 of the Sherman Act by landowners and corporation engaged in sewage treatment business. Suit alleges that the municipality thwarted a potential sale of land to developers by seeking to impose various onerous and anticompetitive restrictions on the developer, including requiring him to purchase the sewer corporation and then requiring the developer to cease serving certain areas and to take over service of certain unprofitable areas.

HELD: State statutes giving municipalities the power to own and operate sewer systems, and to regulate streets, is an insufficient grant of authority for a state action exemption. The state statutes do not explicitly or implicitly authorize anticompetitive activities.

10. *LaSalle National Bank v. County of Lake*, 579 F.Supp. 8 (N.D. Ill. 1984) (damages claimed \$15,000,000).

Plaintiff landowners brought suit alleging that several municipal defendants engaged in a conspiracy to deny sewer service to plaintiffs' land in order to prevent development.

HELD: Same judge and same result as #9 above.

11. *Unity Ventures v. County of Lake*, No. 81-C2745 (N.D. Ill. 1984) (\$28.5 million awarded).

Suit brought by landowner under §§1 and 2 of the Sherman Act against various local governments and local government officials. It was alleged that the plaintiff was deprived of his right to develop land because of a refusal to extend sewer services to his property.

HELD: Jury verdict for \$28.5 million for plaintiffs. Post trial motions pending.

12. *East Naples Water System v. Collier County*, (citation omitted) (damages unspecified).

The developer and owner of a water and sewer plant alleges that the County, in attempting to develop a central water and sewer system, is engaging in monopolistic activities. In addition there is an allegation of illegal tying in that the developer's zoning approval contains various utility conditions dealing with ownership of lines, customer costs, and water and sewer impact fees.

HELD: Suit pending.

13. *Sanders v. Tuscaloosa, Alabama*, No. CV-84-P-1709-W (damages claimed \$2,000,000).

Suit brought under Sherman Act against city and various local officials challenging city's refusal to provide sewer services absent annexation.

HELD: Suit still pending.

14. *Lewis Y El'honen v. County of Wayne and Twp. of*

Van Buren, Michigan, 78-71590 (E.D. Mich. 1978) (damages claimed \$3,000,000).

Suit brought by developer challenging the municipalities' refusal to connect their sewer system to plaintiff's property.

HELD: Suit still pending.

15. *La Salle National Bank v. County of Lake, et al.*, No. 81-C 3160 (N.D. Ill. 1981) (\$60,000,000 damages claimed).

Plaintiff developers brought suit against two municipalities, 47 past or present municipal board members, and two mayors, alleging that a refusal to extend municipal sewer service to plaintiff's property violated Sections 1 and 2 of the Sherman Act.

HELD: Suit pending.

Airport Services and Concessions

1. *Pueblo Aircraft v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982) (damages unknown).

Antitrust suit brought by an unsuccessful applicant for concession space at a municipal airport.

HELD: State statute authorizing municipalities to acquire and operate municipal airports and declaring such operations to be governmental functions is sufficient to establish state action exemption under *Parker* and *Boulder*. The Supreme Court has denied certiorari.

2. *Greyhound v. City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982) (damages claimed \$1,500,000).

Disgruntled franchisee alleged that denial of a license to operate a rent-a-car facility at the municipal airport violated antitrust laws.

HELD: Evidence did not support contract, combination or conspiracy in violation of Sherman Act on theory that successful bidder induced city to insert national specifications in bid package. The Supreme Court has denied certiorari.

3. *Woolen v. Surtran Taxicabs, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978) (damages claimed \$9,000,000).

Action brought challenging single operator award for ground transportation at municipal airport.

HELD: Motion to dismiss denied. State statute authorizing municipalities to establish and operate airports and to contract for the provision of services and home rule statute were not sufficient to establish state action exemption under *Parker*. Class certified. Appeal of denial of motion to intervene pending.

4. *B & W Aero Corp. v. Manchester Airport*, Civ. No. 80-427-D (D.N.H. 1981) (damages claimed \$3,000,000).

Antitrust action brought challenging the sale of fuel by the municipality at the municipal airport.

HELD: Motion to dismiss granted.

5. *Pinehurst Airlines v. Resort Air Services*, 476 F.Supp. 543 (M.D.N.C. 1979) (damages unknown).

Action brought alleging county's award of an exclusive grant to a fixed base operator violated antitrust laws.

HELD: Motion to dismiss denied. State statute

authorizing the granting of concessions to supply goods and services, provided that the public is not deprived of its rightful, equal and uniform use thereof, was not sufficient to establish state action exemption under *Parker*.

6. *Guthrie v. Genessee County*, 494 F.Supp. 950 (W.D. N.Y. 1980) (damages unknown).

Suit brought alleging that county's award of an exclusive operating agreement at the municipal airport violated antitrust laws.

HELD: Motion to dismiss denied. State statute authorizing county to establish and operate an airport and to enter into exclusive agreements for the provision of services was not sufficient to establish state action exemption under *Parker*.

7. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Corp. and City of Houston; Arrow Northwest, Inc. v. Greater Houston Transportation Co. and City of Houston*, No. H-79-2285 and No. H-80-1630 (consolidated) (damages claimed in excess of \$114,000,000).

Suits alleging antitrust violations in award of airport taxicab concession contracts. Motion for summary judgment denied; cases pending on dual motions for class certification.

8. *All-American Cab v. Metropolitan Knoxville Airport*, 547 F.Supp. 509 (E.D. Tenn. 1982), affirmed, No. 82-5612 (6th Cir. 1983) (damages unknown).

An antitrust action alleging that the municipal airport authority and the dispatcher of airport ground transporta-

tion entered into contracts monopolizing airport ground transportation.

HELD: The airport authority, acting under authority granted by the state was protected by the doctrine of sovereign immunity and could not be found liable under the antitrust laws. Governmental activities not subject to antitrust laws.

9. *Alphin Aircraft v. Henson*, Civ. Act. B-81-227 (D. Md. 1981)(damages unknown).

Suit involves action under the Sherman Act alleging attempts to monopolize fixed base operations at a municipal airport.

HELD: *Alphin v. Henson*, 392 F.Supp. 813 (D. Md. 1975, no antitrust violations prior to 1975. The current suit, alleging more recent violations, is still pending.

10. *Transport Limousine v. Port Authority of New York and New Jersey*, 571 F.Supp. 576 (E.D.N.Y. 1983) (\$16,500,000 damages claimed).

Action brought by limousine operator challenging the Port Authority's 8% gross receipts fee. Suit alleges that the fee imposed is a monopoly price violation under the Sherman Act and is part of a conspiracy in restraint of trade.

HELD: The District Court found no agreement or conspiracy in restraint of trade with respect to the tax. The Port Authority, a state created agency, is entitled to state action immunity. Affirmed in Court of Appeals.

11. *Charley's Taxi v. Radio Dispatch*, 562 F.Supp. 712 (D. Hawaii 1983) (damages unknown).

Antitrust suit brought by taxicab company challenging exclusive contract to provide metered taxicab services at state owned airport.

HELD: While the state may fix charges or rentals, there is no evidence that the state intended the Director of Transportation to have the authority to enter into exclusive contracts. The contract is thus not protected from antitrust attack by the state action doctrine.

12. *Hill Aircraft v. Fulton County*, 561 F.Supp. 667 (N.D. Ga. 1983) (damages unknown).

Suit by fixed base operator against municipal airport authority, challenging the authority's allocation of space.

HELD: There was no antitrust violation. Plaintiff failed to show any anticompetitive effect in space allocation, nor did plaintiff show that there was any attempt to monopolize.

13. *Pontarelli v. City of Chicago*, No. 83-C-6716 (N.D. Ill. 1983) (damages unknown).

Clayton Act and Sherman Act (§§1 and 2) suit brought by licensed limousine operators against municipality and competing licensed limousine providers challenging the municipality's grant of rent-free booth and solicitation privileges at O'Hare Airport to defendant operators while denying same privilege to plaintiffs.

HELD: Suit still pending.

14. *O'Hare Wisconsin v. Chicago*, No. 84-C-0995 (N.D. Ill. 1984) (\$7,100,00 damages claimed).

Action by bus company against city and competitor

alleging Sherman Act violation in the city's refusal to permit plaintiff to solicit or receive bus passengers at airport.

HELD: Suit still pending.

15. *C.W. Limousine v. Chicago*, No. 84-C-1232 (N.D. Ill. 1984) (damages unspecified).

Suit brought by bus company under Sherman Act against the city and a competitor challenging city's refusal to permit plaintiff to advertise its services and solicit passengers at airport.

HELD: Suit pending.

16. *Falk v. Chicago*, No. 84-C-2995 (N.D. Ill. 1984) (damages unspecified).

Class action under Sherman Act challenging exclusive award of contract for bus services between airport and the city.

HELD: Suit pending.

17. *Lorrie's Travel v. City and County of San Francisco, et al.*, No. C83-0666 TEH (N.D. Cal. 1983) (damages claimed \$13,000,000).

Suit brought by tour company challenging the award of an exclusive contract to provide ground transportation to and from the airport.

HELD: Case on appeal to Ninth Circuit after grant of defendant's motion to dismiss.

18. *Alamo Rent-A-Car v. Sarasota Manatee Airport Authority*, No. 82-836-Civ-T-H (Injunctive relief only).

Sherman Act suit alleging that airport authority has conspired with other companies to impose a charge on off-site rental companies.

HELD: Antitrust claims dismissed.

19. *Platt v. Easton, Md.*, No. HM 83-3104 (D. Md. 1983) (damages unspecified).

Airport fixed base operator brought suit against the city airport operator alleging that the town conspired to put the plaintiff out of business.

HELD: Suit voluntarily dismissed.

20. *F & L Flight, Inc. v. City of Dixon, Illinois*, No. 82 C 20085 (N.D. Ill.) and *Dixon Aviation v. City of Dixon, Illinois*, No. 81C 20110 (N.D. Ill.) (damages claimed \$3,360,000).

Suits brought by a fixed base operator and a supplier against municipality, the mayor, and a municipal board challenging their refusal to accept Dixon Aviation's FBO bid.

HELD: *Dixon Aviation* dismissed on state action immunity grounds. *F & L Flight* still pending.

21. *Plaza Rent-a-Car v. City of McAllen, Texas, et al.*, No. B-83-2761 (S.D. Tex. 1983) (damages claimed \$6,000,000).

Suit against the municipality, the city manager, and the airport manager alleging a conspiracy in restraint of trade with national car rental agencies through contractual obligations which exclude local rental agencies from municipal airport space.

HELD: Suit pending.

Utility Services

1. *Morrow v. Mrs. Smith*, 540 F.Supp. 1104 (S.D. Oh. 1982) (damages claimed \$2,225,000).

Antitrust action brought against city concerning the termination of services for nonpayment of utility bill. The city does not own the utility but is merely the franchisor.

HELD: City's motion to dismiss antitrust allegations for failure to state a claim granted. Even if allegations were well pleaded, plaintiffs probably lack standing since there is no causal connection between alleged injury and illegal antitrust violation. Moreover, state action exemption may apply.

2. *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980) (damages unknown).

Antitrust suit brought against electric utility by consortium of cities alleging antitrust violations. Utility counterclaimed alleging antitrust violations by cities.

HELD: Counterclaims dismissed without prejudice for failure to comply with pleadings requirements. Court dismissed pleading requirements for the *Noerr-Pennington* "sham" exception.

3. *City of Groton v. Connecticut Light & Power Co.*, 497 F.Supp. 1840 (D. Del. 1980), modified, 662 F.2d 921 (2d Cir. 1981) (damages unknown).

Antitrust suit brought by municipalities against investor-owned utilities supplying electric power to municipalities. Utilities counterclaimed, alleging antitrust violations by cities.

HELD: Municipalities' participation in proceedings alleging federal antitrust violations did not constitute anticompetitive conduct.

4. *City of Newark v. Delmarva*, 497 F.Supp. 323 (D. Del. 1980) (damages unknown).

Municipalities sued electric utility alleging antitrust violations. Utility counterclaimed alleging antitrust violations by municipalities.

HELD: Motion to dismiss counterclaim granted. Municipalities' actions were shielded by *Noerr-Pennington* doctrine.

5. *Rural Electric v. Cheyenne*, No. 82-0416 (D. Wyo. 1982) (damages unknown).

Suit brought by electric company alleging that the municipality and individual municipal officials violated the antitrust laws by granting an exclusive franchise to a competitor.

HELD: Suit still pending.

Towing Services

1. *Sherrer v. City of Huntington Beach*, No. CV-80-826-MML (C.D. Cal. 1981) (damages unknown).

Action brought challenging the city's refusal to put a company on its list of eligible companies for police-directed towing services.

HELD: Summary judgment for defendant granted. Since all towing occurs on intrastate roadways and the

towed cars are brought to a storage lot within the city, the municipal activity does not have a sufficient nexus with interstate commerce to permit subject matter federal court jurisdiction.

2. *Shurtleff v. San Jose*, 698 F.2d 1232 (9th Cir. 1983) (damages claimed \$3,000,000).

Antitrust suit brought challenging refusal to include a towing company on the city's rotation list for city-directed towing.

HELD: The municipality, as a purchaser of services, cannot be a conspirator under the antitrust laws.

3. *Kendrick v. Augusta, Georgia*, C.A. No. 179-266 (S.D. Ga. 1981) (damages unknown).

Losing bidder for contract to tow abandoned cars from city streets brought suit challenging award of contract to successful bidder.

HELD: City's motion for summary judgment granted for lack of federal subject matter jurisdiction (plaintiff failed to show substantial effect upon interstate commerce).

4. *Fryer's Wrecker, et al. v. Daytona Beach, Florida* No. 84-140-Civ-Orl-11 (M.D. Fla. 1984) (damages unspecified).

Disappointed bidder alleging an illegal restraint of trade, brought Sherman Act suit against city challenging award of bid for police directed towing to a better bidder.

HELD: Suit pending.

5. *Mabe v. Galveston, Texas*, No. G-83-302 (S.D. Tex. 1983) (damages unspecified).

Individual refused permit for automobile wrecker business under a "public convenience and necessity" standard brought suit under the Sherman Act challenging the denial.

HELD: Suit pending.

6. *El Paso Wrecker v. El Paso, Texas*, No. EP-82-CA-276 (damages claimed \$1,500,000).

Suit brought by wrecker company alleging that the city boycotted the wrecker service in city towing business.

HELD: Suit settled.

Mass Transit

1. *Crocker v. Padnos*, 483 F.Supp. 229 (D. Mass. 1980) (damages claimed \$1,500,000).

Suit brought by unsuccessful bidder for contract to provide bus transportation for city alleging antitrust violations in award of contract.

HELD: City's motion to dismiss granted. Conduct engaged in as an act of government by the state as sovereign or by its subdivisions, pursuant to state policy, is exempt from federal antitrust laws. Formation of transit authority pursuant to state statute indicates state's policy to displace competition.

2. *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, 722 F.2d 1284 (6th Cir. 1983) (damages unknown).

A municipality brought suit under the Sherman Act against the regional transit authority, alleging violations of the Sherman Act through the authority's attempts to monopolize public transit in the region.

HELD: State statutes establishing the regional transit authority indicated that the state legislature intended to authorize monopoly public transit services.

3. *Monte Gibson, et al. v. Park City Municipal Corporation, et al.*, No. C-81-0823W (D. Ut. 1981) (damages claimed \$9,000,000).

Plaintiff hotel developer alleged that the city conspired with other hotel operators by moving a bus stop 100 yards into a central transportation center and delaying approval of building permits.

HELD: After two years of discovery and \$250,000 in attorneys' fees, summary judgment was granted defendants. Appeal pending in Ninth Circuit.

Licenses and Concessions

1. *Cincinnati Riverfront v. City of Cincinnati, C.A.* No. C-1-82-128 (S.D. Ohio) (damages claimed \$3,000,000).

Suit by a disgruntled lessee of a municipally owned parking facility over the terms of the lease restricting the scheduling of events at a privately owned coliseum. The lease restricts events at the coliseum held simultaneously with events at the nearby stadium leased by the municipality.

HELD: Defendant's motion for summary judgment under the state action exemption denied, 556 F. Supp. 664 (S.D. Oh. 1983). Trial verdict in favor of defendants. Appeal pending.

2. *Kurek v. Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977), reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979) (damages unknown).

Suit brought alleging that various activities of municipality in award of franchise to operate concession business at municipal golf course were in violation of antitrust laws.

HELD: Evidence failed to establish a violation of antitrust laws.

3. *Contract Marine Carriers v. City of Richmond*, No. 83-0231-R (E.D. Va. 1983) (damages claimed \$15,000,000).

Suit by user of municipal port against municipality and corporation which contracted to manage municipal port, alleging that excessive rates were charged to plaintiff port user and that the defendants contracted and conspired to monopolize port operations.

HELD: Suit still pending.

4. *University Wines v. Boulder*, No. 83-K-1199 (D. Colo. 1983) (damages unknown).

Suit brought by applicant for liquor license challenging the municipality's refusal to grant plaintiff a liquor license. Suit alleged conspiracy in restraint of trade between municipality and current holder of licenses.

HELD: Motion to Dismiss granted. State statutes regulating alcohol immunize defendants. No evidence of concerted action. Alcohol licensing is a quasi-judicial function entitled to judicial immunity. Appeal expected.

5. *William Mirshak v. Jeremiah Joyce*, No. 83-C-6716 (N.D. Ill. 1983) (damages claimed \$3,000,000).

Suit brought against individual police officers and alderman who allegedly conspired to prevent plaintiff from obtaining a liquor license and harassing plaintiff.

HELD: Suit still pending.

6. *Pizza Inn v. Irving, Texas* (citation omitted) (damages claimed \$6,000,000).

Suit brought by property owner challenging a denial of a rezoning application which resulted in plaintiff's inability to obtain a liquor license.

HELD: Suit settled after plaintiff was awarded rezoning.

Contracts

1. *Suttles v. City of Dayton*, No. 76 1055 (Oh. Comm. Pls. (damages claimed \$3,000,000).

Suit involved an award of a contract for security services at a park.

HELD: Case settled.

2. *Southwest Concerts, Inc. v. Arena Operating Co., et al.*, No. H-79-457 (S.D. Tex. 1979) (damages claimed \$1,500,000).

Action brought by concert promoter alleging antitrust violations in city of Houston's leasing arrangements for city-owned concert hall.

HELD: Motion for summary judgment pending.

3. *Englert v. City of McKeesport*, 736 F.2d 96 (3rd Cir. 1984) (damages unknown).

Sherman Act suit challenging municipal decision to contract out all municipal electrical inspection work with one company.

HELD: Plaintiff alleged sufficient facts in order to establish that interstate commerce was adversely affected, as required to establish the necessary jurisdictional prerequisites. Remanded for trial.

4. *Hoffman v. Glendale Heights*, 581 F.Supp. 367 (N.D. Ill. 1984) (damages claimed \$375,000).

Antitrust suit brought by disappointed bidder on municipal construction project alleging a conspiracy between successful bidder and the municipality in the award of the contract.

HELD: State statutes authorizing municipalities to waive competitive bidding on projects such as the one herein is sufficient grant of authority for state action exemption to apply. In addition, a state statute granting to local governments a "state action exemption" to the application of the federal antitrust laws supports the grant of immunity.

5. *Shay v. City and County of San Diego*, No. 83-26281 (S.D. Cal. 1983) (damages claimed \$800,000,000).

Suit brought alleging the existence of a conspiracy to deny plaintiff the opportunity for service and repair contracts for computer data processing equipment.

HELD: Suit dismissed for lack of jurisdiction.

6. *Phone Program v. New York Off Track Betting Corporation, et al.*, 83 CIV 1486 (S.D. N.Y. 1983) (damages claimed \$1,207,737).

Plaintiff alleges that it was precluded from bidding on a contract because it did not meet all the contract specifications.

HELD: Suit still pending.

7. *Eastway Construction v. City of New York*, 84 CIV 0690 (S.D. N.Y. 1984) (damages claimed \$1.2 billion).

Suit brought against city and numerous officials alleging a conspiracy between city and a mortgage lender to deny plaintiff city construction work.

HELD: Suit still pending.

8. *Driscoll v. City of New York*, 82 CIV 8497 (S.D. N.Y. 1982) (damages claimed \$20,000,000).

Suit brought alleging a conspiracy to monopolize and monopolization as a result of a restrictive covenant contained in a lease between the city and a bus line.

HELD: Suit still pending.

Telephone

1. *Jackson v. Taylor*, 539 F. Supp. 593 (D.D.C. 1982) (damages unknown).

Suit by prisoners against municipal jailer alleging price-fixing of telephone calls from prison.

HELD: The operation of a prison is not generally susceptible to antitrust suits. See *Jordan v. Mills*, 473 F.Supp. 13 (E.D. Mich. 1979).

2. *Capital Telephone v. City of Schenectady*, 560 F.Supp. 207 (N.D. N.Y. 1983) (damages unknown).

Suit brought by a telephone company under the Sherman Act alleging the municipality and various municipal officials violated the antitrust laws by denying the company of a franchise to provide line telephone service to the municipality.

HELD: Municipal action was protected by the state action exemption since a state statute explicitly authorized the city to review and act upon franchise applications.

Taxicabs

1. *Independent Taxi v. Kansas City*, No. 81-0692-CV-4 (W.D. Mo. 1981) (damages unknown).

involves the municipal regulation of the number of taxicabs permitted to operate.

HELD: Suit voluntarily dismissed by plaintiff without prejudice.

2. *Gordon v. Los Angeles Transit*, 726 F.2d 1430 (9th Cir. 1984) (damages unknown).

Suit brought by taxicab company challenging city licensing and ratemaking regulations and its failure to renew the company's license.

HELD: State statutes authorizing municipal regulation of taxicabs immunize municipal regulation of taxicabs and antitrust laws. Direct municipal regulation satisfies the "active supervision" requirement. Affirmed by Ninth Circuit Court of Appeals.

3. *Campbell v. City of Chicago*, 577 F.Supp. 1166 (N.D. Ill. 1983) (damages claimed \$320,000,000).

Suit brought by taxicab operator challenging agreement between municipality and private taxicab operators limiting number of licenses issued.

HELD: State statute authorizing municipal licensing of taxicab services not specific enough to satisfy "clear articulation" requirement. No state action immunity. Interstate nexus test met.

4. *Bates v. Kansas City, Missouri, et. al.*, No. 83-1311-CV-W-3 (W.D. Mo. 1983) (damages unspecified).

Sherman Act suit against city alleging a conspiracy to limit the number of taxicab permits.

HELD: Ordinance fixing number of permits removed by city as part of settlement.

5. *CAB Drivers v. San Diego, California*, NO. 505902 (Superior Court of California) (injunction only).

Sherman Act suit brought challenging municipal regulation of taxicab fares.

HELD: Judgment for City.

Parking

1. *Corey v. Look*, 641 F.2d 32 (1st cir. 1981) (damages unknown).

Parking lot operator brought suit under Sherman Act, alleging that municipality and a steamship authority conspired to eliminate plaintiff as a competitor in the parking market.

HELD: The municipality is not immune from suit under the state action exemption doctrine. Suit was subsequently settled.

Police Power

1. *Lucky Lady Card Room v. San Diego, California, et al.*, (citation omitted) (injunction relief only).

Suit brought against city and police chief alleging that an ordinance regulating cardrooms is an illegal restraint of trade.

HELD: Suit pending.

2. *Jim Fant Properties v. Virginia Beach, Virginia*, No. CA-83-851-N (D. Va. 1983) (damages claimed \$2,500,000).

Suit brought alleging a conspiracy to restrain trade by adopting an ordinance allegedly restricting the advertising of hotel rates in the tourist district.

HELD: Antitrust portion of the suit dismissed with prejudice.

3. *Eshelman v. Culver City, California*, No. CV-82-0840 (C.D. Cal. 1982) (damages unspecified).

Suit brought under Sherman Act challenging a municipal ordinance restricting permits for sale of fireworks to veterans' groups. Individual councilmen were also defendants.

HELD: Settled by paying \$12,500.00 to plaintiff.

4. *Johns Niagara Hotel v. Niagara Falls, New York*, No. CIV-83-1448 (W.D. N.Y. 1983) (damages claimed \$15,000,000).

Suit brought by hotel operator alleging a conspiracy among the city and other hotel operators to monopolize the hotel and convention business in Niagara Falls.

HELD: Suit still pending.

5. *Harrowgate String Band v. Philadelphia New Year's Shooters, et al.*, C.A. 84-2736 (E.D. Pa. 1984) (damages unspecified).

HELD: Suit still pending.